In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled cases on May 7, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit as to which review is now sought is reported in CCH Trade Reg. Rep. (1968 Trade Cas.) ¶72,443 (10th Cir. 1968). The prior opinion of this Court

in these cases is reported as *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967). The prior opinion of the United States Court of Appeals for the Tenth Circuit, is reported as *Continental Baking Co. v. Utah Pie Co.*, 349 F.2d 122 (10th Cir. 1965). There are no opinions issued by the District Court.

The opinion of the Tenth Circuit as to which review is here sought is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 7, 1968. (R. 4). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a Court of Appeals properly adhere to its original view of the facts of a case, on remand following a reversal in the Supreme Court, and base another decision upon its original view of those facts, where the Supreme Court's reversal was expressly grounded upon the Court of Appeals' erroneous view of those facts in the first instance?

2. In ruling upon the admissibility of a damage exhibit in a private antitrust case, may a Court of Appeals make its own factual findings with respect to causation, or is it obliged to give the evidence an interpretation best calculated to uphold the ruling of the trial court and sustain the jury's verdict?

3. May a Court of Appeals properly deduce, solely from the dollar amount of a general verdict for unliquidated damages, that a jury has rejected the bulk of plaintiff's claim, although the wrongful acts of the defendant must inevitably have resulted in injury of the type which the Court of Appeals concludes has been rejected?

4. In a private antitrust case in which there is ample evidence to sustain a damage award far greater than the general verdict which the jury has returned, may a Court of Appeals reverse the judgment on the theory that the admission of the plaintiff's damage exhibit was prejudicially erroneous because the Court of Appeals believes that the jury awarded damages on only a portion of the plaintiff's claim, and that the evidence does not support such a large verdict for that portion of the plaintiff's claim?

5. Where the record contains evidence of impact of the type for which an antitrust plaintiff claims damages in its damage exhibits, do objections as to the methods employed in preparing these exhibits go to the weight of the evidence or to its admissibility?

6. May a Court of Appeals predicate a finding of error in the admission of a damage exhibit upon aspects of the exhibit as to which no objection was taken at trial?

7. In a private antitrust action in which the plaintiff claims damages for injury resulting from unlawful pricing activity of several competitors, does the plaintiff carry the burden of proving that damages are entirely and uniquely attributable to the acts of a particular defendant or is it sufficient if the plaintiff shows that a

defendant's unlawful pricing practices were a substantial cause contributing to plaintiff's injury?

8. Did the admission in evidence of Utah Pie's damage exhibits constitute prejudicial error as to any or all of the respondents?

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1952); and Sections 3, 4 and 16, of the Clayton Act, 38 Stat. 731, §§ 3, 4, and 16 (1941), 15 U.S.C. §§ 14, 15, and 26 (1952); U.S. Const. amend. VII. These statutes are set out in Appendix B.

STATEMENT

This was an action brought by petitioner Utah Pie Company ("Utah Pie") against three competitors, respondents here,[1] to recover damages suffered by petitioner as a result of respondents' violations of the federal antitrust laws. The jury brought in verdicts finding that each respondent had individually violated Section 2 of the Clayton Act, as amended, to the injury of Utah Pie in stated amounts. (Tr. 1283-1284). Utah Pie and all three respondents are manufacturers of frozen pies. These are "primary line" price discrimination cases.

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[1]Continental Baking Company ("Continental" or "Morton"); Pet Milk Company ("Pet") and Carnation Company ("Carnation").

The Court of Appeals for the Tenth Circuit concluded that the evidence was insufficient to support the jury's verdicts and ordered judgment entered for respondents. 349 F.2d 122 (1965).

This Court granted certiorari and reversed, finding that with respect to each of the three respondents the evidence supported the jury's verdict that its price discriminations violated the antitrust laws. (386 U.S. 685). This Court remanded the cases to the Tenth Circuit for further proceedings. (386 U.S. at 704).

On remand, the Tenth Circuit, in a second opinion, again reviewed the evidence in the case at length, adhering substantially to its original views:

> "In passing on the issue of probable injury to competition in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts, in five parts. (See Continental Baking Company v. Utah Pie Company, 10 Cir., 349 F.2d 122.)
>
> . . .
>
> "Reference is here made to the facts set forth in our former opinion and the appendices thereto. . . .
>
> . . .
>
> "Of course, we will undertake to supplement facts set forth in our former opinion by additional facts in the record pertinent to a proper consideration of the additional issues now before us for determination; and we will repeat facts stated in our former opinion where we deem it desirable so to do. . . ." (App. "A" hereto, pp. 6-7).

Based upon its views of the evidence, the Tenth Circuit then again reversed the judgment in favor of Utah

Pie and remanded these cases for retrial on all issues. (App. "A" hereto, p. 74).

The grounds for the Tenth Circuit's reversal this time were that the admission of Utah Pie's damage exhibits was prejudicially erroneous in light of the evidence in the record. The extended opinion of the Tenth Circuit contains substantially no reference to legal authority; it is a re-assertion of the Tenth Circuit's view that, on the evidence, plaintiff has not made out a case.

The "error" which the Court of Appeals now finds is based upon its unaltered conclusion that the jury disregarded most of plaintiff's damage exhibits, that Utah Pie's evidence of "causation" was insufficient to support the award under the other portions of its damage exhibits; that the exhibits should have been excluded, and that their admission in evidence was reversible error.

Utah Pie's basic damage exhibit, which the Tenth Circuit held to have been erroneously admitted into evidence, was Pl. Ex. 95. The various categories of damage claims set forth in Pl. Ex. 95 are as follows:

Line (A): Loss of profit on lost sales under Utah Pie's proprietary "Utah Pie" brand.

Line (B): Lost sales in Seattle, Spokane and Portland areas.

Line (C): Lost sales in Denver (Continental only).

Line (D): Lost sales to Safeway under Bel Air brand (Pet only).

Line (E): Loss of profit due to depressed prices on sales actually made under private labels.

Line (F): Loss of profit due to depressed prices on sales actually made under "Utah Pie" label.

Line (G): Loss due to injury to good will and "going business concern" value.

Supporting exhibits upon which Pl. Ex. 95 is based include Pl. Ex. 62, actually a part of the study prepared by respondents' economics expert; Pl. Ex. 94, prepared by Gaylen Rigby, Utah Pie's sales manager; and Pl. Exs. 96-101, computations prepared by Grant Caldwell, Utah Pie's accounting witness.

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1. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON PET'S DISCRIMINATIONS

In reviewing the prior decision of the Tenth Circuit, this Court said, *inter alia:*

> "The Court of Appeals first concluded that Pet's price differential on sales to Safeway must be put aside in considering injury to competition because in its view of the evidence the differential had been completely cost justified and because Utah would not in any event have been able to enjoy the Safeway custom. Second, it concluded that the remaining discriminations on 'Pet-Ritz' and 'Swiss Miss' pies were an insufficient predicate on which the jury could have found a reasonably possible injury either to Utah Pie as a competitive force or to competition generally.
>
> "We disagree with the Court of Appeals in several respects. First, *there was evidence from which the jury could have found considerably more price discrimination by Pet with respect to 'Pet-Ritz' and*

'Swiss Miss' pies than was considered by the Court of Appeals. . . .

"Second, with respect to Pet's Safeway business, the burden of proving cost justification was on Pet and, in our view, reasonable men could have found that Pet's lower priced, 'Bel-air' sales to Safeway were not cost justified in their entirety . . . the jury . . . reasonably could have found a greater incidence of unjustified price discrimination than that allowed by the Court of Appeals' view of the evidence.

"With respect to whether Utah would have enjoyed Safeway's business absent the Pet contract with Safeway, . . . *Pet's evidence that Utah's unwillingness to install quality control equipment prevented Utah from enjoying Safeway's private label business is not the only evidence in the record relevant to that question. There was other evidence to the contrary. The jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business.*" (386 U.S. at 693-696; emphasis added, footnotes omitted).

The Tenth Circuit paid its respects to this Court's opinion as follows:

"Thus, it will be seen that Safeway's unwillingness to purchase frozen 'Bel-air' pies from Utah Pie was *due to Utah Pie's refusal to meet Safeway's requirements with respect to quality controls, coding device, and type of carton used.*" (App. "A" hereto, p. 36; emphasis added).

This holding is, of course, utterly irreconcilable with this Court's prior express holding on the same point.

Similarly, with respect to the Swiss Miss and Pet-Ritz pricing, the Tenth Circuit has simply disregarded this

Court's holding that its first opinion was wrong. It still relies upon the erroneous tables appended to its original decision. (Appendices II, IV, and V, 349 F.2d at 159-162). For good measure, it reprints as Appendix "B" to its present opinion the same table of Pet-Ritz prices which was Appendix IV to its original opinion. (Compare App. "A" hereto, at p. XVI with 349 F.2d at 161). The Tenth Circuit still finds 9 months of Pet-Ritz discrimination as against 17 months of discrimination found by this Court. (Compare App. "A" hereto, p. 57 with 386 U.S. at 694; App. "A" hereto, p. 60 with 386 U.S. at 694).

The Tenth Circuit is still wrong. Its table of Pet-Ritz pricing for Salt Lake City is appreciably more beneficial to Pet than Pet's own exhibit A-35. The Tenth Circuit's table of Pet-Ritz prices is much more beneficial to Pet with respect to California prices than are Pet's actual invoices for California towns in the Great Valley of California all around its Fresno plant. (Compare App. "A" hereto, p. XVI with Pl. Exs. 116, 118, 119 and 122).

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2. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON THE EFFECT OF CONTINENTAL'S CONDUCT

In reviewing the record as to Continental in connection with the "violation" issue, this Court said:

> "Effective for the last two weeks of June it offered its 22-ounce frozen apple pies in the Utah area at $2.85 per dozen. It was then selling the same pies at substantially higher prices in other markets. The Salt Lake City price was less than its direct cost plus an allocation for overhead. Utah's going price at the time for its 24-ounce 'Frost 'N' Flame' apple pie

sold to Associated Grocers was $3.10 per dozen, and for its 'Utah' brand $3.40 per dozen. At its new prices, Continental sold pies to American Grocers in Pocatello, Idaho, and to American Food Stores in Ogden, Utah. Safeway, one of the major buyers in Salt Lake City, also purchased 6,250 dozen, its requirement for about five weeks. Another purchaser ordered 1,000 dozen. Utah's response was immediate. It reduced its price on all of its apple pies to $2.75 per dozen. Continental refused Safeway's request to match Utah's price, but renewed its offer at the same prices effective July 31 for another two-week period. Utah filed suit on September 8, 1961. Continental's total sales of frozen pies increased from 3,350 dozen in 1960 to 18,800 dozen in 1961. Its market share increased from 1.8% in 1960 to 8.3% in 1961. *The Court of Appeals concluded that Continental's conduct had had only minimal effect, that it had not injured or weakened Utah Pie as a competitor, that it had not substantially lessened competition and that there was no reasonable possibility that it would do so in the future.*

"We again differ with the Court of Appeals. Its . . . retrospective assessment fails to note that Continental's discriminatory below-cost price caused Utah Pie to reduce its price to $2.75. . . . Safeway, which had been buying Utah brand pies, immediately reacted and purchased a five-week supply of frozen pies from Continental, thereby temporarily foreclosing the proprietary brands of Utah and other firms from the Salt Lake City Safeway market." (386 U.S. at 698-699; emphasis added).

Although Continental's price cuts directly forced Utah Pie to unprecedented low price levels on all of its pies sold in Salt Lake, the Tenth Circuit specifically holds

that the jury awarded Utah Pie nothing at all for its claim for losses based on the reduced prices at which it was obliged to sell the pies it was actually able to sell. According to the Tenth Circuit, these claims, embodied in Parts (E) and (F) of Pl. Ex. 95, were completely rejected by the jury. (App. "A" hereto, pp. 33-35, 37-38, 47).

But, as this Court's opinion recognized, the price-eroding effect of Continental's 1961 price cuts (for which damages were claimed in Parts (E) and (F) of Pl. Ex. 95) was particularly devastating to Utah Pie.

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3. THE TENTH CIRCUIT HAS ADHERED TO ITS PREVIOUS VIEWS ON CARNATION

This Court analyzed the case against Carnation (and the Tenth Circuit's erroneous view of the evidence) as follows:

> "After Carnation's temporary setback in 1959 it instituted a new pricing policy to regain business in the Salt Lake City market. The new policy involved a slash in price of 60¢ per dozen pies, which brought Carnation's price to a level admittedly well below its costs, and well below the other prices prevailing in the market. *The impact of the move was felt immediately, and the two other major sellers in the market reduced their prices. Carnation's banner year, 1960, in the end involved eight months during which the prices in Salt Lake City were lower than prices charged in other markets. The trend continued during the eight months in 1961 that preceded the filing of the complaint in this case.* In each of those months the Salt Lake City prices charged by Carna-

tion were well below prices charged in other markets, and in all but August 1961 the Salt Lake City delivered price was 20¢ to 50¢ lower than the prices charged in distant San Francisco. The Court of Appeals held that only the early 1960 prices could be found to have been below cost. That holding, however, *simply overlooks evidence from which the jury could have concluded that throughout 1961 Carnation maintained a below-cost price structure and that Carnation's discriminatory pricing, no less than that by Pet and Continental, had an important effect on the Salt Lake City market.*" (386 U.S. at 701; emphasis added).

This Court's opinion recognizes that Carnation's willful, predatory price discriminations had price-depressing as well as business-diverting effects. Nevertheless, the Tenth Circuit concludes that the *only* impact which the jury's verdict encompasses is that for loss of sales in the "Utah Pie" brand, and injury to good will:

"We have shown that the jury's verdict against Carnation was based on parts (A) and (G) of Exhibit 95. . . ." (App. "A" hereto, p. 73).

Moreover, the Tenth Circuit's present opinion attempts to exonerate Carnation in other ways inconsistent with this Court's prior opinion. In particular, the Tenth Circuit continues to treat Carnation's pricing policy not as a result of its own predatory, volitional acts but rather as an innocent matter beyond Carnation's control, and which could not have caused Utah Pie any harm. (See App. "A" hereto, p. 66).

The Tenth Circuit further stated, as fact, that Carnation's price discriminations did not win it any business

which would otherwise have gone to Utah Pie. (App. "A" hereto, esp. p. 73).

Thus, by combining its analysis of the jury's verdict with its own analysis of the causal factors at work in the market, the Tenth Circuit again arrives at the conclusion that Utah Pie's damage claim against Carnation was not supported by the evidence.

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4. THE COURT OF APPEALS HAS "PSYCHOANALYZED" THE JURY'S VERDICTS AS A PREDICATE FOR HOLDING UTAH PIE'S DAMAGE VERDICTS INADMISSIBLE

The jury's verdicts in this case were general verdicts, in each instance for far less than total damage claims:

	Maximum Claim (Pl. Ex. 95)	Verdict (Tr. 1283-1284)
Pet	$261,046	$44,197
Continental	$381,197	$24,994
Carnation	$ 98,892	$29,277

Based upon the amounts of the verdicts, the Tenth Circuit concluded that the jury had found damages in only two of the seven categories covered by Utah Pie's damage exhibit. (See App. "A" hereto, pp. 33-35, 37-38, 47).

The Tenth Circuit reached these conclusions as follows:

> "It will be observed that the jury returned a verdict against Carnation of $29,277, which is exactly $10,000 more than the $19,277 damages allocated to Carnation on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; that it returned a verdict of $24,994 against Continental, which is exactly $10,000 more than the $14,994 damages allocated to

Continental on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; and that it returned a verdict of $44,197 against Pet, which is exactly $10,000 more than the $34,197 damages allocated to Pet on the $3.70 per dozen sales price basis in part (A) of Exhibit 95. (See also Exhibit 96, page 5).

"The *only damages allocated equally among the appellants were the claimed damages for injury to good will in part (G) of Exhibit 95. Hence, it is perfectly clear that the jury based its damages award for loss of sales on the last line of part (A) of Exhibit 95.*" (App. "A" hereto, p. 33; emphasis added).

Having concluded, from this analysis, that the jury has ignored all except Part (A) and Part (G) of Utah Pie's damage study, the Tenth Circuit then proceeds to its lengthy analysis of the evidence. It decides that the evidence does not support Parts (A) and (G) of Utah Pie's damage exhibit in their entirety and concludes that all three cases must be tried over in accordance with special procedures set out in its opinion. (App. "A" hereto, pp. 48-49).

The Tenth Circuit's conclusion that the jury disregarded most of Utah Pie's damage claim is not based upon special interrogatories to the jury, for none were submitted. The jury verdicts were general verdicts on unliquidated claims.

Parts (E) and (F) of Pl. Ex. 95, Utah Pie's damage exhibit, claim damages for *reduced prices on the sales which Utah Pie did make.* (Tr. 528-529). The Tenth Circuit concluded that the jury's verdicts were not based to any extent on impact of that kind, since (according to

Judge Phillips) the jury awarded damages under only Parts (A) and (G) of Utah Pie's damage exhibit.

The Tenth Circuit's conclusion again conflicts directly with this Court's prior opinion. This Court clearly stated:

> "At times Utah Pie was a leader in moving the general level of prices down, and *at other times each of the respondents also bore responsibility for the downward pressure on the price structure. . . . In this case, the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination.*" (386 U.S. at 703; emphasis added).

If respondents' unlawful price discriminations drove the general level of prices down, it is inconceivable that Utah Pie would not have experienced some injury in terms of reduced prices as a result.

Similarly, the Tenth Circuit's opinion excludes the possibility that the jury's verdict against Pet compensated Utah Pie's injury resulting from loss of Safeway business, as claimed in Part (D) of Utah Pie's damage exhibit, Pl. Ex. 95. But the holding that Utah Pie lost none of the Safeway business directly conflicts with this Court's prior holding that "[t]he jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business." (386 U.S. at 696).

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5. THE WEIGHT TO BE GIVEN TO UTAH PIE'S DAMAGE EXHIBIT WAS LEFT TO THE JURY

At the trial, Grant Caldwell, the accountant who prepared Utah Pie's damage exhibits (Pl. Exs. 95-101) underwent lengthy *voir dire* and cross-examination on all

of those exhibits, and explained both the sources of his information and his methods. (Tr. 523-551).

A large part of the information underlying Caldwell's damage charts came from the defendants. For example, a study of Utah Pie's cost of goods manufactured as computed by Mr. Zimmerman, an accountant retained jointly by all three defendants (Tr. 525); a "flavor mix" revealed by the market study made, for respondents, by Dr. Anderson and Dr. Lamborne (Tr. 526, 527, 535, 547; See Pl. Ex. 62; Tr. 399); "I.B.M. runs" (i.e., computer printouts) prepared by respondents based upon Utah Pie's sales (Tr. 547; see Pl. Exs. 4, 91).

Insofar as Caldwell's damage exhibits rested upon claims of lost sales, they were based upon the opinion testimony of plaintiff's sales manager, Gaylen Rigby, embodied in Pl. Ex. 94 (Tr. 528, 534, 537, 545; Compare Pl. Ex. 94 with Pl. Ex. 95). The same was true with respect to his calculation of injury to Utah Pie's good will (Compare Tr. 522 with Tr. 529).

With one exception, the portions of Caldwell's main damage exhibit (Pl. Ex. 95) which dealt with reduced prices did *not* contain a particular figure representing what would have been a competitive price (See Pl. Ex. 95, Parts (A), (B), (C), and (F)). Instead, Mr. Caldwell made alternative computations based upon a *range* of prices from $4.30 down to $3.70 per dozen, leaving to the jury the decision as to which (if any) of those prices would have prevailed in the absence of defendants' discriminations (Tr. 529, 540-541, 542, 543).

The one exception to Mr. Caldwell's "alternative" approach to price calculations was in Part (E) of Pl. Ex.

95. There Mr. Caldwell calculated the difference between prices which Utah Pie actually received on its *private* label pies and the amount which it would have received if it had received prices comparable to those shown in Pet's Safeway contract (Tr. 537, 550-551; See Pl. Ex. 42).

Pl. Ex. 95 was supported by other exhibits which spelled out the methods used in computing the component parts of Pl. Ex. 95. (See Pl. Exs. 96-101; Tr. 530-539). Caldwell did not purport to testify as an expert in merchandising; he testified that ". . . anybody operating on the same assumptions could have made the same computations." (Tr. 543).

In arguing damages to the jury, plaintiff's counsel did not suggest that Caldwell's charts should be given any greater weight than the jury's view of the facts which supported them. He said, inter alia, in reference to Pl. Ex. 95 ". . . you aren't bound by any of the figures on this chart." (Tr. 1157).

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6. THERE WAS A GREAT DEAL OF EVIDENCE ON DAMAGES IN ADDITION TO UTAH PIE'S DAMAGE EXHIBITS

Evidence which the jury had before it while assessing damages included:

1. The exhibits showing prices charged by defendants in various competitive situations where they were, and were not, competing with Utah Pie (Pl. Exs. 6-16, 20-22, 24-29, 35, 39, 40-42, 52, 56-57, 64-74, 76-80, 83-89, 103, 110-112, 116-122; D. Exs. C-B through C-F), including exhibits which showed that Pet's prices in the Great Valley of California, in the immediate vicinity of its Fresno

plant, were *up* from $4.28 to $4.40 per dozen for Pet-Ritz from 1959 to 1961. (Pl. Exs. 116, 118, 119, 122);

2. The evidence of Utah Pie's sales prices (including its price *increase* from $4.15 per dozen to $4.30 per dozen for "Utah Pie" in 1958, and its subsequent price reductions to $2.75 in 1961). (Pls. Exs. 4, 62, 91; D. Ex. A-35);

3. Dr. Anderson's and Dr. Lamborne's computations, for defendants, of sales volumes, prices and market shares of all sellers in Salt Lake. (D. Ex. PA-35; Pl. Exs. 62, 93);

4. Utah Pie's history of profit and loss as shown by its books. (Pl. Ex. 92);

5. Testimony of Halgren, Carnation vice president, that "Sometimes the market grows from 100,000 to 200,000 cases in a single year. If you don't grow with that, you are not getting your share." (Tr. 1120);

6. Direct testimony of respondents' witness Degenhart that in the absence of respondents' price cuts the level of prices in the market would have remained above $3.70 per dozen. (Tr. 659);

7. Testimony by Dr. Anderson, defendants' economics expert, that loss of market share in the proprietary brand business "could be" a competitive injury. (Tr. 1037, 1038);

8. Gaylen Rigby's testimony, as Utah Pie's sales manager, on Utah Pie's lost sales, reduced prices, and injury to good will. (Tr. 506, 515, 522);

9. Testimony of Myron, Ross, Bryant and Gaylen Rigby that Utah Pie Company had the capacity to handle

additional business without any substantial additional investment. (Tr. 438-439, 446, 455, 471, 520-521);

10. All of the testimony of the witnesses with respect to the nature of the markets for pies, the manner in which pies were priced, and the effects of prices and price changes upon competition and upon the competitive position of competitors in those markets.

This evidence would easily have supported verdicts greatly in excess of the verdicts actually rendered.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The ostensible grounds for the Tenth Circuit's most recent decision in these cases is error in the admission of evidence. However, it cites no law on the admission or exclusion of evidence. Instead, it reviews the evidence, maks inferences, and draws factual conclusions in over 100 typewritten pages, inclusive of tables and appendices.

The Tenth Circuit's conclusion is that Utah Pie's damage exhibit should not have been admitted in evidence *in the light of the facts as it finds them.* The "error" is in admitting an exhibit which does not comport with the Tenth Circuit's view of the facts.

Moreover, the Tenth Circuit's present view of the facts, following this Court's opinion, is substantially unchanged from that set out in its prior opinion. It now says: "In passing on the issue of probable injury to competition in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts, in five parts." (App. "A" hereto, p. 6.)

The Tenth Circuit was wrong on the facts the first time. See this Court's prior opinion, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967).

It is still wrong on the facts, and the inferences which a jury could reasonably draw from them. Its numerous conclusions with respect to causation are a completely unwarranted invasion of the jury's province. The Tenth Circuit's approach in these cases conflicts directly with prior pronouncements of this Court. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), cf. opinion of Mr. Justice White, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, ___ U.S. ___, ___, ___ St. Ct. ___, ___ L. Ed. 2d ___ (June, 1968).

As one of the cornerstones of its decision, the Tenth Circuit has undertaken to assay the mental processes by which the jury arrived at its general verdicts by analyzing the amounts of the verdicts. In so doing, the Tenth Circuit has come into direct conflict with other Circuits, and most particularly the Second Circuit, which have held that such an analysis is not possible and should not be undertaken. This error has ramifications greatly transcending the field of private antitrust cases.

In its analysis of Utah Pie's damage exhibit, the Tenth Circuit has again come into conflict with other Circuits, and with the prior decisions of this Court dealing with damage proof in antitrust cases. The Tenth Circuit, in ruling Utah Pie's damage study inadmissible, has misplaced the burden of the uncertainty inherent in the damage proof in a case of this kind. Its instructions with

respect to the method of proving damages on remand and the burden of proof are again erroneous and in conflict with the law of other circuits.

Because the Tenth Circuit has deviated so greatly from the principles laid down by this Court and by other circuits, and because of the importance of the antitrust laws to the nation's economic well-being, and the importance of the private remedy for enforcement of the antitrust laws, the Tenth Circuit's decision in these cases should be reviewed.

REASONS FOR GRANTING THE WRIT

1. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISION OF THIS COURT IN THE SELF-SAME CASE

Judge Phillips' second opinion for the Tenth Circuit in this case presents an absolutely irreconcilable conflict with the prior opinion of this Court. In part, Judge Phillips has categorically contradicted this Court's prior opinion. In part, he has analyzed the record in a manner completely at odds with this Court's views of the evidence and its significance. Throughout his opinion, he has construed the record in such a way as to support reversal of the judgments which had been entered in favor of Utah Pie, rather than to support affirmance. No matter how sincerely a Court of Appeals may be convinced that it would have reached a different result as a trier of fact, it has neither the power nor the right to disregard the pronouncements of this Court.

Judge Phillips, in the Tenth Circuit's present opinion says:

". . . in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts . . ." (App. "A" hereto, p. 6).

In reversing the Tenth Circuit's first decision in this case, this Court found any number of points on which the Tenth Circuit's original opinion did *not* correctly state the facts:

"We disagree with the Court of Appeals in several respects." (386 U.S. at 693).

"[T]he jury could have found considerably more price discrimination with respect to 'Pet-Ritz' and 'Swiss Miss' pies than was considered by the Court of Appeals." (386 U.S. at 693-694).

". . . the jury . . . reasonably could have found a greater incidence of unjustified price discrimination than that allowed by the Court of Appeals' view of the evidence." (386 U.S. at 695).

"The Court of Appeals first concluded . . . Utah would not in any event have been able to enjoy the Safeway custom. . . . There was other evidence to the contrary. The jury would not have been compelled to find that Utah Pie could not have gained more of the Safeway business." (386 U.S. at 693, 695-696).

"Third, the Court of Appeals almost entirely ignored other evidence which provides material support for the jury's conclusion. . . ." (386 U.S. at 696).

"We again differ with the Court of Appeals." (386 U.S. at 699).

"That holding, however, simply overlooks the evidence. . . ." (386 U.S. at 701).

This Court should insist upon respect for its views in the Courts of Appeals. Otherwise, it will write well-considered opinions which, in the last analysis, have no practical effect upon the administration of justice.

In fact, it is apparently becoming customary in recent years for Courts of Appeals to adhere to their original results in Robinson-Patman cases, after reversal by this Court, by slight modifications in approach, and by placing the decision on a different ground. Compare *Borden Co. v. FTC (cease and desist order set aside)*, 339 F.2d 133 (5th Cir. 1964), *reversed* 383 U.S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153, *cease and desist order again set aside*, 381 F.2d 175 (5th Cir. 1967); *Anheuser-Busch, Inc. v. FTC (cease and desist order set aside)*, 265 F.2d 677 (7th Cir. 1959), *reversed* 363 U.S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385, *cease and desist order again set aside* 289 F.2d 835 (7th Cir. 1961) with *Moore v. Mead Service Co.* (*nonsuit affirmed*), 184 F.2d 338 (10th Cir. 1950) *remanded per curiam*, 340 U.S. 944, 71 S. Ct. 502, 95 L. Ed. 681, *remanded for trial* 190 F.2d 540 (10th Cir. 1951); *judgment for plaintiff reversed with instructions to dismiss*, 208 F.2d 777 (10th Cir. 1953), *Tenth Circuit reversed, judgment for plaintiff on verdict affirmed*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145.

2. IN THE GUISE OF AN EVIDENCE RULING, THE TENTH CIRCUIT HAS INVADED THE JURY'S PROVINCE TO DECIDE QUESTIONS OF CAUSATION

The Tenth Circuit's decision is riddled with conclusions about causation.[2] For example:

". . . because Utah Pie was unwilling to meet Safeway's requirements as to quality control and coding device, as stated above, Safeway would not have purchased from Utah Pie 'Bel-air' frozen fruit pies at any price. . . ." (App. "A" hereto, p. 37). (But see this Court's precisely contrary conclusion, 386 U.S. 685, at 695-696, 87 S. Ct. 1326, 18 L. Ed. 2d 406)

". . . it would be unreasonable to infer that Pet's gain resulted from any sales loss by Utah Pie." (App. "A" hereto, p. 63).

"What Utah Pie lost in 1959 went not to Carnation, but to other sellers in that market area. . . ." (App. "A" hereto, p. 73).

"The market share of both Carnation and Utah Pie increased in 1960, but it is clear that those gains resulted from loss of market share by sellers other than Utah Pie and Carnation." (App. "A" hereto; p. 73).

". . . Gaylen S. Rigby testified it was his opinion that, but for the price discriminations of the appellants, the sales of . . . 'Frost 'N' Flame' brand frozen pies to Associated Grocers and the reduction of Associated Grocers' purchases of 'Utah' brand pies to an insignificant number in each of those years would not have affected or decreased the sales of 'Utah' brand pies . . . and that Utah Pie would have

[2]Of course, the Tenth Circuit's entire opinion is devoted to an elaborate discussion of the Circuit's views on the market for pies, pricing, marketing conditions, competitive factors, etc. which bear upon causation.

continued to maintain a market share percentage of 70.41 per cent of the frozen pies sold by it and the appellants, exclusive of controlled and private brand frozen pies, through the sale of more 'Utah' brand pies to other buyers in such market area.

"Moreover, Rigby was assuming that, absent such discriminations, Utah Pie would have continued to sell 'Utah' brand frozen pies at not less than $3.70 per dozen in 1960 and 1961. . . .

"We believe the conclusion is inescapable that the failure of Utah Pie to maintain in 1960 and 1961 the market share percentage of frozen pies, exclusive of controlled and private brand frozen pies, sold by it and the appellants in the Salt Lake City market area in 1958 . . . was due in a very large part to the fact that Associated Grocers, . . . purchased only an insignificant number of 'Utah' brand pies in 1960 and 1961; and that it was not due in substantial part to any relative increase of sales in such market area in 1960 and 1961 by the appellants of their brands of frozen pies." (App. "A" hereto, pp. 29-30).

As this Court observed in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962), "[u]ndoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" The Tenth Circuit has clearly violated those principles here.

THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS ON THE INTERPRETATION OF JURY VERDICTS

One of the indispensable building blocks of the Tenth Circuit's most recent holding in this case is its analysis of how the jury arrived at its general verdicts. (See App. "A" hereto, pp. 33-35, 37-38, 47).

The Tenth Circuit, through use of certain arithmetical calculations, has given the jury's general verdicts the effect of verdicts on special interrogatories to the jury. It has concluded that the jury awarded nothing on account of most of the claims set forth in Utah Pie's damage exhibit (Parts (B), (C), (D), (E) and (F)), but did award specific amounts under the other parts of that exhibit (Parts (A) and (G)). (See App. "A" hereto, pp. 33-35, 37-38, 47.)

That holding flouts the well-established principle that a general verdict ". . . throws its mantle of impenetrable darkness over the operations of the jury." *Foster v. Moore-McCormack Lines,* 131 F.2d 907, 908 (2d Cir. 1942). A general verdict is an "impenetrable mystery." *Delta Engineering Corp. v. Scott,* 322 F.2d 11, 15 (5th Cir. 1963).

The Second Circuit, quoting Sunderland, Verdicts, General and Special, 29 Yale L. J. 253 (1920), states: "No judicial reagents exist for either a qualitative or quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. . . . *The general verdict is as inscrutable and essentially mysterious as the judgment which issued from*

the ancient oracle of Delphi." Skidmore v. B & O RR. Co., 167 F.2d 54, 60 (2d Cir. 1948), cert. den. 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (emphasis added).

In an earlier Second Circuit antitrust case, the damage claim was $14,402.26 and the verdict for $7,701.13, or exactly one half of the claim-plus-$1,000.00. The Second Circuit said: ". . . with the jury's method of arriving at the result we have no concern." *(Straus v. Victor Talking Machine Co.,* 297 Fed. 791, 804 (2d Cir. 1924).)

The Tenth Circuit's analysis of the jury's verdicts, a keystone of its decision, is in conflict with the well-established rule in other circuits, and indeed in American practice generally. For this reason alone, the decision of the Tenth Circuit should be reviewed and reversed.

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4. THE COURT OF APPEALS HAS BASED ITS DECISION ON PURPORTED ERRORS AS TO WHICH NO ADEQUATE OBJECTION WAS MADE AT TRIAL

The Court of Appeals says "[o]ver the objections of each of the appellants, Utah Pie introduced its Exhibit 95. . . ." (App. "A" hereto, p. 22). It also says "[o]ver objections of each of the appellants, Utah Pie also introduced its Exhibits 62, 94, and 96 to 101, inclusive, upon which Exhibit 95 is based." (App. "A" hereto, p. 25.) This considerably overstates the case.

In the first place, it is not true. Some objections were made by all respondents, and some objections by only one or two of them. Moreover, and more important, the

"errors" upon which the Tenth Circuit bases its reversals were not, in part, suggested at the trial of the case.

Specifically, Gaylen Rigby's testimony that Utah Pie had suffered a loss of $75,000 in good will was admitted in evidence *without any objection* whatsoever. (Tr. 522). No objection was ever taken to the allocation of that claim between all of the respondents equally. Nevertheless, the Court of Appeals ruled that it was "grossly unfair to Continental for the accountant . . . arbitrarily to allocate to Continental the same amount for loss of good will as it did to each of the other appellants." (App. "A" hereto, pp. 47-48).

The Tenth Circuit also holds that it was "manifest error" to admit part (A) of Pl. Ex. 95 into evidence against Continental because that exhibit claimed damages for the years 1959 and 1960 during which, according to the Tenth Circuit, Continental had caused Utah Pie no injury. (App. "A" hereto, p. 47). Again, however, *no objection* on this ground was ever made at the trial.

The so-called "errors" with respect to the admission of Pl. Ex. 95 against Pet and Carnation is that ". . . parts (A) and (G) of Exhibit 95 and the exhibits on which such parts were based, presented a clearly erroneous factual foundation for the computation of damages and . . . their admission was plain and prejudicial error." (App. "A" hereto, p. 64, cf. p. 73).

As already observed, there was no objection taken to the testimony of $75,000 of lost good will, or to its allocation among respondents in part (G). If the allocation was unfair to Continental in the sense that it allocated

too much of this damage to Continental, it was certainly more than fair to Pet and Carnation. But in any event, *no objection* was made.

It is well settled that, despite the liberality of Fed. R. Civ. P. 46 abolishing formal exceptions, a specific statement of the grounds of objection to the admission of evidence must be made. *Carona v. Pioneer Life Ins. Co.*, 357 F.2d 477 (5th Cir. 1966).

The Tenth Circuit's disregard of this fundamental principle requires review and correction.

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5. THE TENTH CIRCUIT'S OBSERVATIONS GO TO THE WEIGHT OF THE EVIDENCE, NOT TO ITS ADMISSIBILITY

Respondents did present certain objections with respect to Utah Pie's damage exhibits during the course of the trial. They objected to the method of computation of market shares for the "name" brand pies. They also had extensive *voir dire* and cross-examination with respect to these computations and the basis upon which they were made. (Tr. 514-551).

At the close of Utah Pie's examination of the accountant, and its introduction of the damage exhibits, the trial court said: "I think all these objections go to the weight, rather than the admissibility of this exhibit." (Tr. 538). The opinion of the experienced trial judge in this case is itself worthy of considerable weight.

As the second circuit observed in *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962), "[t]here is no bright line that divides evi-

dence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high."

Although the second circuit affirmed the District Court in excluding damage evidence in the *Herman Schwabe* case, it did so on facts materially different from those in the cases at bar. Moreover, the Second Circuit decision in *Herman Schwabe* was an *affirmance* of the trial court's ruling, not a reversal of it.

In this case, the Tenth Circuit *has* "set the threshold to the jury room too high." Its decision should be reviewed and the proper threshold for the admission of damage evidence in cases like this definitively determined for the benefit of bench and bar.

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6. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL ON PROOF OF DAMAGES IN ANTITRUST CASES

This Court has repeatedly upheld verdicts in private antitrust cases over objections that the plaintiffs had failed to prove damages with requisite certainty. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

Utah Pie's evidence in this case left no doubt that defendants' violations had had an adverse impact on Utah Pie's business and property. Once that was established, Utah Pie was entitled to a verdict based upon such a reasonable estimate of the *amount* of damages as the evidence would permit.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567, 51 S.Ct. 248, 252, 75 L.Ed. 544, 550 (1931), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378, 47 S.Ct. 400, 405, 71 L.Ed. 684, 691 (1927), allow proof of damages by opinion testimony.

In numerous decisions in other circuits, recovery based upon opinion damage testimony has been permitted. For example, in *William H. Rankin Co. v. Associated Bill Posters*, 42 F.2d 152, 155 (2d Cir. 1930), plaintiff was permitted, over objection, to

> "... show by the testimony of its treasurer and by a compilation he had made, based on the net profits of the business in 1911 and from his knowledge of business conditions when free of the defendants' unlawful interference, *what he considered would have been the normal increase of this plaintiff's business from year to year.*" (42 F.2d at 155; emphasis added).

Judgment for Rankin was affirmed. The *Rankin* case has been followed, on this point, in *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1, 5 (7th Cir. 1959).

The Ninth Circuit, in *Richfield Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959) analogized the private antitrust action to a personal injury action, and noting that:

"In neither [type of case] can the plaintiff prove to any mathematical certainty, what are the damages in dollars and cents." (271 F.2d at 715).

More recently, the Ninth Circuit upheld a judgment for plaintiff based upon opinion testimony in *Rangen, Inc. v. Sterling H. Nelson & Sons*, 351 F.2d 851, 856 (9th Cir. 1965).

Still more recently, the Ninth Circuit has had occasion to consider a judgment assertedly based upon "unsupported 'mere interested guesses'" in *Washington State Bowling Prop. Ass'n. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966). The Ninth Circuit said:

> "Once a jury finds plaintiff was injured by defendant's unlawful acts, it may estimate the amount of damages proximately flowing from the illegal act. In showing the *fact* of damage, plaintiff is charged with a higher quantum of proof than in proving the *amount* of damage. . . . As to amount, exact certainty or any precise formula is not required. . . ." (356 F.2d at 379).

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7. THE TENTH CIRCUIT HAS MISPLACED THE BURDEN OF PROOF IN CASES OF THIS KIND

Although it has not held that joinder for purposes of trial is improper in these three cases, the Court of Appeals has very minutely prescribed the manner in which the case should be retried. (App. "A" hereto, pp. 48-49). In effect, the Court of Appeals has ordered three separate consecutive trials, requiring each defendant to conclude its separate defense before the special evidence against the next defendant is presented. As the Court of Appeals assesses the result:

"This means that Utah Pie must prove its damages against each appellant separately and should not be permitted to introduce evidence to establish a claim of damages in one lump sum and then distribute it to the several appellants." (App. "A" hereto, p. 49).

This ill-conceived procedure completely misallocates the burden of proof with respect to the uncertainties inherent in a case of this kind. The difficulties inherent in separating those elements of damage which are attributable to one defendant from those attributable to another, should fall upon defendants who have indulged themselves in unlawful conduct, rather than upon an innocent plaintiff.

Section 433A of *Restatement of Torts*, 2d, reads as follows:

"Apportionment of Harm to Causes

"(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

"(2) Damages for any other harm cannot be apportioned among two or more causes."

Assuming, however, that the source of harm *is* allocable, the burden of the apportionment is upon the defendant and not upon the plaintiff. See *Restatement of Torts*, 2d, Section 433B.

8. THE TENTH CIRCUIT HAS APPLIED AN INCORRECT RULE OF CAUSATION

The decision of the Tenth Circuit apparently would require Utah Pie to precisely distinguish between injury caused by the violations of each of the respondents separately. (App. "A" hereto, p. 49).

The rule is otherwise:

> "Normally, it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); or 'substantially contributed, notwithstanding other factors contributed also', *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (C.A. 1st Cir. 1948), cert. denied, 336 U.S. 967 (1949). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 805-806 (C.A. 1st Cir.), cert. denied 379 U.S. 931 (1964)." (Concurring op. of Mr. Justice White, *Perma Life Mufflers, Inc. v. International Parts Corp.*, ____ U.S. ____, ____ S.Ct., ____ L.Ed.2d ____.

To eliminate uncertainty about the applicable rule, the Tenth Circuit's decision should be reviewed and reversed.

CONCLUSION

The decision of the Tenth Circuit in these cases simply disregards this Court's prior decision in these very cases (as well as the record). The decision of the Tenth Circuit also conflicts with decisions of other circuits, and this Court, on points which are fundamental to the review

of jury verdicts in federal courts in general, and to the administration of the federal antitrust laws in particular. If left unreversed, the Tenth Circuit's decision in this case will sow confusion for years to come in a field of litigation which now occupies more of the time of the federal courts than any other type of litigation. For these reasons, the Petition for Writ of Certiorari should be granted, and the decision of the Tenth Circuit reversed.

Dated, San Francisco, California,
July 29, 1968.

Respectfully submitted,
JOSEPH L. ALIOTO,
MATTHEW P. MITCHELL,
ROBERT W. HUGHES,
By JOSEPH L. ALIOTO,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
Tenth Circuit

March Term—1968

Continental Baking Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7306
Carnation Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7308
Pet Milk Company, a Delaware corporation, Appellant, vs. Utah Pie Company, a Utah corporation, Appellee.	No. 7309

Appeals from the United States District Court
for the District of Utah

John H. Schafer (Roy M. Anderson, Gordon A. Thomas, Welborn & Dufford, and Robert J. Muth, Jonathan D.

Blake, Covington & Burling, of counsel, on the brief) for appellant, Continental Baking Company.

Peter W. Billings (G. Kenneth Handley, Jr., and James R. Baird, Jr., of counsel, on the brief) for appellant, Carnation Company.

George P. Lamb (Lee, Toomey & Kent, Carrington Shields and Gene Mayfield, of counsel, on the briefs) for appellant, Pet Milk Company.

Matthew P. Mitchell (Joseph L. Alioto and Robert W. Hughes on the brief) for appellee, Utah Pie Company.

Before Murray, Phillips and Lewis, Circuit Judges.

Phillips, Circuit Judge.

Utah Pie Company[1] brought this action against Continental Baking Company,[2] Carnation Company,[3] and Pet Milk Company[4] under Title 15 USCA §§ 15 and 26.[5]

The complaint charged that the appellants entered into a combination and conspiracy to restrain interstate commerce and monopolize such commerce in violation of §§ 1 and 2 of the Sherman Act (15 USCA §§ 1 and 2), to be effected by destroying the competition of Utah Pie through weakening of its capital structure and the destruction of its profits, and to violate § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15

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[1]Hereinafter called Utah Pie.

[2]Hereinafter called Continental.

[3]Hereinafter called Carnation.

[4]Hereinafter called Pet.

[5]Continental, Carnation, and Pet collectively will be referred to hereinafter as the appellants.

USCA § 13(a)), by price discrimination in the State of Utah, effected by selling their frozen pies at prices "below cost" in the State of Utah and at lower prices in such state than they charged for their frozen pies "in other western states."[6]

The case came on for trial in February 1963. At the close of the evidence, each appellant duly moved for a directed verdict in its favor on the § 2(a) claims asserted by Utah Pie. Each motion was denied.

The jury returned a verdict in favor of the appellants on the conspiracy claim and a verdict against each appellant on Utah Pie's § 2(a) claims. Each appellant, in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, duly made a timely motion to set aside the verdict against it and enter judgment n.o.v. in its favor on Utah Pie's § 2(a) claims. Each motion was denied.

On February 23, 1963, a consolidated judgment was entered in favor of Utah Pie and against each of the several appellants for treble the amount of the verdict returned against it and for attorneys' fees and costs, and on the same day a decree was entered against each appellant permanently enjoining it from violating § 2(a).

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[6]Throughout the proceedings Utah Pie shifted from theory to theory as to the basis for its claims of § 2(a) violations. In the complaint, the theory was lower prices in Utah than in other western states; at the pretrial, it was lower prices in six western states and higher prices in "another area"; at the trial, it apparently was lower prices in the Salt Lake City market area (which we will hereafter define) and higher prices in the Los Angeles market area; and the injunctive decree was apparently based on lower prices in five western states and higher prices in the entire State of California. Moreover, in Utah Pie's brief in No. 7308, Utah Pie relies on lower prices in five western states and higher prices in northern California.

Each of the appellants separately appealed from such judgment and decree. Thereafter, the injunctive decree was stayed by this court by an order entered March 21, 1963.

Each appellant, in its statement of points, urged several grounds for reversal. This is a second hearing of such appeals by this court. At the first hearing, we considered only one of the grounds urged by each of the appellants, that is, that the evidence against it was insufficient to warrant the jury in finding that it had engaged in price discrimination between purchasers of commodities of like grade and quality or in other acts, the effect of which had been, or the probable effect of which would be substantially to lessen competition or to tend to create a monopoly in any line of commerce. We concluded the evidence was insufficient to support such a finding and reversed the judgment and directed that the case be remanded, with instructions to enter a judgment in favor of each of the appellants against Utah Pie on its § 2(a) claims.

By a petition for a writ of certiorari, Utah Pie sought review in the Supreme Court. The Supreme Court granted the writ and held that the evidence as to each appellant was sufficient to sustain a finding of probable injury to competition by price discrimination by it, within the meaning of § 2(a), and reversed the judgment and remanded the case to this court for consideration of the other grounds urged by the appellants for reversal, expressly stating it did not intimate "any views" on such other grounds. See Utah Pie Co, v. Continental Baking Co., 386 U.S. 685.

Each of the appellants has filed a separate supplemental brief and a reply brief and Utah Pie has filed a consolidated supplemental answer brief. Such other grounds for reversal have been orally reargued and the case again submitted to this court.

The jury also returned a verdict in favor of Continental on a counterclaim asserted by it, charging a § 2(a) violation by Utah Pie. On Utah Pie's n.o.v. motion, the court set aside that verdict and entered judgment on the counterclaim in favor of Utah Pie, notwithstanding it had not moved for a directed verdict in its favor on the counterclaim.

We held that the trial court erred in entering judgment n.o.v. in favor of Utah Pie, because it had not moved for a directed verdict in its favor on the counterclaim, but for reasons stated in our former opinion, we remanded the case for a new trial on the issues raised by the counterclaim. Continental and Utah Pie acquiesced in our decision with respect to the counterclaim. Hence, only a limited consideration of the counterclaim will be necessary.

In our approach to the remaining issues presented by these appeals respecting Utah Pie's § 2(a) claims, we start with two established premises:

1. That the evidence against each appellant was sufficient to support a finding by the jury of price discrimination by it, the probable effect of which would be injury to competition within the meaning of § 2(a);

2. Since the jury found in favor of the appellants on Utah Pie's conspiracy claim and Utah Pie has not and does not challenge that finding, the case in its present

posture presents a separate and distinct § 2(a) violation claim against each appellant, which must be separately considered.

While claimed injury to competition and compensable damages to Utah Pie present separate issues, in that the former may be only probable and in the future, and the latter must have already occurred, we must keep in mind that the Supreme Court distinguished the instant case from the cases relied on by this court in its former opinion, for the reasons stated by the Supreme Court, that they involved no "long-term market price decline," no "general decline in price structure," and no "lasting impact upon prices."

In passing on the issue of probable injury to competition in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts, in five parts. (See Continental Baking Company v. Utah Pie Company, 10 Cir., 349 F.2d 122.) Those five parts are:

1. A general statement of facts pertinent in all the appeals (349 F.2d 126-130, inclusive);

2. A statement of facts in the main pertinent only in the Pet Milk appeal (349 F.2d 130-137, inclusive);

3. A statement of facts in the main pertinent only in the Continental appeal (349 F.2d 137-142, inclusive);

4. A statement of facts in the main pertinent only in the Carnation appeal (349 F.2d 142-147, inclusive);

5. Tables and charts in the text of the opinion and in the appendices thereto, the latter appearing at 349 F.2d 157-165, inclusive.

Reference is here made to the facts set forth in our former opinion and the appendices thereto, since in this opinion certain of the facts stated in our former opinion either will not be restated or will not be restated in as great detail as they were in such former opinion.

Of course, we will undertake to supplement facts set forth in our former opinion by additional facts in the record pertinent to a proper consideration of the additional issues now before us for determination; and we will repeat facts stated in our former opinion where we deem it desirable so to do, or necessary to a clear and accurate reflection of the context in which such repeated facts appear in this opinion.

I

General Statement of Facts

The evidence in these cases covers the period 1958 to 1961, both inclusive.[7] It is free from substantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof.

The facts stated with respect to the offering prices, selling prices, sales volume, percentage of market shares, earnings, and other like matters, the tables and charts which appear in this and our former opinion, and the appendices annexed to this and our former opinion are all based on uncontroverted documentary evidence, some of which was introduced by Utah Pie and some by the appellants.

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[7]It also reflects the sales volume in 1962 of Continental and Utah Pie and certain pertinent general facts with respect to the parties prior to 1958.

The phrase "frozen fruit pies" is sometimes used in the frozen pie industry in a broad sense and as including frozen apple, cherry, boysenberry, peach, pumpkin, and mince pies, although the last two are not, strictly speaking, fruit pies. In its broad sense, that phrase does not embrace frozen cream pies, such as lemon cream, chocolate cream, cocoanut cream, and the like.

The frozen pies involved in these appeals are those embraced in the phrase "frozen fruit pies" in its broad sense.[8] We will hereafter refer to them simply as "frozen pies." The phrase "frozen fruit pies" is also used in a more narrow sense, as embracing only the strictly fruit pies, and not including mince or pumpkin pies. Frozen fruit pies in that narrow sense will be referred to herein as "frozen fruit pies."

Utah Pie, a Utah corporation, owned and operated by the Rigby family, was in the fresh pie business for nearly 30 years prior to 1957. It marketed its fresh pies in Salt Lake City and other points in Utah, in Las Vegas, Nevada, Grand Junction, Colorado, Farmington, New Mexico, Evanston, Wyoming, and at one other city in Nevada, the name of which does not appear in the record.

Faced with a declining volume and a substantial loss in its fiscal year ended October 31, 1957, Utah Pie, in August of that year, entered the frozen pie business. It had much of the facilities needed for the frozen pie business in its old plant. It opened a new plant in 1958, which had a capacity, at least by 1961, on a three-shift basis of 40,000 frozen pies per day, or about one and one-half

[8]It was stipulated that the only frozen pies here involved were frozen apple, cherry, peach, boysenberry, mince, and pumpkin.

million cases of frozen pies per year. There are six pies in a case. It had adequate refrigeration for fruit, production facilities, and storage of frozen pies. Its frozen pie business was well managed and its sales and transportation costs were low. It had the only frozen pie plant located in the Salt Lake City market area, which enabled it to deliver to its customers frozen pies in both small and large quantities.

The six western states of California, Washington, Oregon, Utah, Arizona, and Colorado embrace a portion of the Inter-Rocky Mountain and West Coast regions. In each of such states there are one or more separate and distinct frozen pie market areas, which comprise a large metropolitan center and the territory closely adjacent thereto. There are distinct frozen pie market areas in and adjacent to Los Angeles, San Francisco, Seattle, Portland, Spokane, Salt Lake City, Phoenix, and Denver. The periphery of each of such market areas is nearly the same as that of the area in which its metropolitan newspapers circulate; that, because retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales. The current retail price in a particular market area at a particular time is generally fixed by the prices at which the chain stores and cooperative grocery organizations advertise their frozen pies in the Thursday and Friday editions of the local newspapers, published and circulated in that market area.

The Salt Lake City market area involved in these appeals comprises most of the State of Utah, southern Idaho, and small areas adjacent to Utah in the States of Wyoming, Colorado, and Nevada. That market area

developed its own competitive pattern. No brand seemed to enjoy a consumer's loyalty, with the possible exception of Utah Pie's "Utah" brand. Pies were purchased primarily on a price basis. The prevailing retail price was fixed by the advertised weekend specials appearing in the local newspaper advertisements of the retailers on Thursday and Friday. During the period 1958 to 1961, inclusive, retailers of frozen pies in the Salt Lake City market area advertised Utah Pie's brands a great many more times than they did brands of each of the other manufacturers selling in that market area.

At the beginning of the period here involved, the frozen pie business was comparatively new. But by that time it had become highly competitive and it remained so throughout such period.

The price in a particular market area depends upon the number and identity of the competing manufacturers, the competitive factors in such market area, and the extent of the thrust or pressure of such factors at a particular time.

A local manufacturer and seller, with his plant located in a particular market area, because of his low distribution and selling costs, preferences normally given to a local business, and his ability to sell and distribute frozen pies in either large or small quantities is in a position to assert a very substantial competitive thrust and pressure, not present where there is no local manufacturer and seller competing in the area.

Another competitive factor, which affects prices and exists in some market areas, is the sale of private or controlled brands of frozen pies, which are usually sold

by the large retail chains and members of cooperative grocery organizations, and are purchased by them in large quantities at preferential prices. A controlled label is owned by the manufacturer, but is sold by it only to one buyer in a particular market. A private brand is owned by the buyer and may be manufactured by one or more suppliers.

In the first part of 1958 Utah Pie marketed its frozen pies in Utah and Idaho. It gradually extended its sales to other areas, so that by 1961 it was selling f ozen pies in Utah, Idaho, Washington, Colorado, and Wyoming. However, its sales outside of Utah and southern Idaho during the period involved in these appeals, 1958 to 1961, were negligible. See Appendix I, annexed to our former opinion (349 F.2d 157-158).

It affirmatively appears from uncontroverted evidence that it was Utah Pie's intention, at the time it entered the frozen pie business in the Salt Lake City market area in August 1957, which was more than a year before there was any claimed or established price discrimination by any of the appellants in such market area, to obtain and retain a dominant position in the frozen pie business in such market area by there offering and selling its frozen pies at prices substantially below those at which its competitors there offered or sold their pies.

The earliest month, during which comparative prices at which frozen pies were sold by Utah Pie and each of the appellants are shown in the record, was January 1958.

In the following price comparisons, we will use frozen apple pie prices, because frozen apple pie is the most

popular and the volume leader of the frozen pies, sells at the lowest prices, and is the most accurate price indicator.

In January 1958, which was 23 months before there was any price discrimination by Pet in the Salt Lake City market area, it sold in such market area its frozen apple pie, "Pet-Ritz," its then only brand, at prices ranging from a low of $4.84 per dozen to a high of $5 per dozen, and Utah Pie sold in such market area its frozen apple pie, "Utah," its then only brand, at $4.15 per dozen, viz., 69 cents to 85 cents per dozen less than Pet's price.

In January 1958, in the Salt Lake City market area, Carnation sold its frozen apple pie, "Simple Simon," for $4.82 per dozen and Utah Pie sold its "Utah" brand frozen apple pie for $4.16 per dozen. In October, November, and December, 1958, Carnation's price for its frozen apple pie was $3.90 per dozen in Salt Lake City, San Francisco, Spokane, and Denver, and Utah Pie's price for its "Utah" brand frozen apple pie was $4 per dozen in Salt Lake City. But it was not until February 1960 that there was any difference in Carnation's prices for its frozen apple pies in those four cities. In that month, its price in San Francisco was $3.60 per dozen and its price in Salt Lake City, Spokane, and Denver was $3.30 per dozen.

And in January 1958, which was more than two years before there was any claimed § 2(a) violation by Continental in the Salt Lake City market area, Continental sold in such market area its frozen apple pie, "Morton," its only brand, at $4.94 per dozen and Utah Pie sold in such

market area its frozen apple pie, "Utah," its then only brand, at $4.16 per dozen.

The following table, based on invoices of actual sales, copies of which appear in Pet's Exhibit A-35, a "Market Share and Price Trend Study on 8" Frozen Fruit Pies in the 'Intermountain Market'" by Drs. Anderson and Lamborn of Utah State University, sets out the comparative *median* prices at which frozen pies were sold in the Salt Lake City market area by Utah Pie and each of the appellants in the months of January to December 1958, inclusive, and shows that during such period Utah Pie consistently kept its prices for its frozen pies substantially below the prices for frozen pies of each of the appellants. The prices in such table are for cases of six. The price per dozen was approximately double the price per case.

1958	Apple	Cherry	Peach	Boysenberry	Mince	Pumpkin
January						
Utah Pie	2.08	2.08	.....	2.08	.....	.....
Pet Milk	2.47	2.62	2.44	2.84	.....	.....
Carnation	2.42	2.51	.....	2.76	2.87	.....
Continental	2.47	.....	.....	2.77	2.77	2.62
February						
Utah Pie	2.15	2.15	.....	2.15	.....	.....
Pet Milk	2.50	2.50	2.52	2.64	2.85	2.58
Carnation	2.54	2.53	2.60	.....	.....	2.58
Continental	2.58	2.58	2.58	2.73	.....	3.05
March						
Utah Pie	2.15	2.15	.....	2.15	.....	.....
Pet Milk	2.50	2.50	2.53	2.65	.....	.....
Carnation	2.50	2.50	.....	2.64	.....	.....
Continental	2.58	.....	.....	.....	.....	.....

1958	Apple	Cherry	Peach	Boysen-berry	Mince	Pumpkin
April						
Utah Pie	2.05	2.08	—	2.07	—	—
Pet Milk	2.50	2.50	2.50	2.66	—	—
Carnation	2.50	2.50	—	2.65	—	—
Continental	2.58	2.58	—	—	—	—
May						
Utah Pie	2.04	2.04	—	2.04	—	—
Pet Milk	2.51	2.53	2.54	2.69	—	—
Carnation	2.50	2.50	2.50	2.65	—	—
Continental	2.58	2.58	2.58	2.73	—	3.05
June						
Utah Pie	2.04	2.04	—	2.04	—	—
Pet Milk	2.54	2.54	2.54	2.69	—	—
Carnation	2.50	2.54	2.60	2.65	—	—
Continental	—	—	—	—	—	—
July						
Utah Pie	2.04	2.04	—	2.04	—	—
Pet Milk	2.55	2.55	2.55	2.70	—	—
Carnation	2.50	2.56	2.58	2.73	—	—
Continental	2.58	2.58	—	—	—	—
August						
Utah Pie	2.04	2.04	—	2.04	—	—
Pet Milk	2.52	2.49	2.54	2.68	—	—
Carnation	2.55	2.54	—	2.70	—	—
Continental	—	—	—	—	—	—
September						
Utah Pie	2.04	2.04	—	2.04	2.00	2.00
Pet Milk	2.51	2.49	2.52	2.68	2.79	2.34
Carnation	2.51	2.52	—	2.65	—	—
Continental	—	—	—	—	—	—
October						
Utah Pie	2.03	2.03	—	2.03	1.96	2.00
Pet Milk	2.52	2.52	2.55	2.70	2.67	2.43
Carnation	2.50	2.50	—	2.65	2.61	2.36
Continental	—	—	—	—	2.58	2.34

1958	Apple	Cherry	Peach	Boysen-berry	Mince	Pumpkin
November						
Utah Pie	2.03	2.04	—	2.04	2.14	1.96
Pet Milk	2.52	2.52	2.52	2.67	2.64	2.35
Carnation	2.50	2.50	—	2.65	2.66	2.41
Continental	2.58	2.58	—	—	—	—
December						
Utah Pie	2.00	2.00	—	2.00	2.00	1.92
Pet Milk	2.50	2.50	2.50	2.65	2.66	2.38
Carnation	2.54	2.50	—	2.65	—	2.44
Continental	—	—	—	—	—	—

Gaylen S. Rigby testified that the dates and amounts of the major changes made by Utah Pie in the price of its "Utah" brand pie were as follows:

Prices of Utah Brand Pie

Date	Old	New
4/14/58	$ 4.15	$ 4.00
8/10/59	4.00	3.70
6/23/61	3.70	2.75
12/01/65	2.75	2.90

But the record shows that Utah Pie's price per dozen for its "Utah" brand frozen apple pie in

December	1959	was	$ 3.60
August	1960	was	3.50
September	1960	was	3.16
January	1961	was	3.43
February	1961	was	3.50
March	1961	was	3.10
April	1961	was	3.50

Utah Pie's prices for its frozen pies were f.o.b. the purchaser's warehouse, if it was located in Salt Lake City, and if located outside of Salt Lake City, f.o.b. Utah Pie's plant.

The manufacturers and distributors of national brands, who sell throughout the United States, the manufacturers and distributors of regional brands, who sell in several local market areas, and sometimes a local manufacturer and distributor, whose single plant is located in a particular market area where his principal business is done, but who also may sell in other market areas in the same region, usually make up the group competing in a local market area. More than 30 different brands are sold in the six western states referred to above, and the number of nation-wide manufacturers of frozen pies is over 200.

The brands, or labels, used by the parties to these appeals were as follows:

Utah Pie	"Utah," "Frost 'N' Flame," "Mayfresh," and "Sonny Boy";
Carnation	"Simple Simon";
Continental	"Morton's";
Pet	"Pet-Ritz" and "Swiss Miss."

Utah Pie and Pet also manufactured frozen pies for Safeway Stores, Inc.,[9] under the latter's label, "Bel-air."

"Utah" was the label under which Utah Pie sold its frozen pies generally to retailers. "Frost 'N' Flame,"

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[9] In 1962, Safeway Stores, Inc., with its headquarters in Oakland, California, owned and operated 1,852 food stores in 27 states and the District of Columbia, extending from the East Coast to the West Coast of the United States.

At the trial, Gaylen S. Rigby testified that Safeway maintained a Salt Lake City Division; that such Division embraced all of its stores in Utah, almost all of its stores in Idaho, a few of its stores in eastern Nevada, a few of its stores in Oregon, and a few of its stores in Wyoming; that the aggregate of the stores in the Division exceeded 60; and that Utah Pie delivered the frozen pies it sold to Safeway to the latter's warehouse in Salt Lake City, from which Safeway transported them to its stores located in such Division and elsewhere.

"Mayfresh," and "Sonny Boy" were controlled labels. "Bel-air" was a private label belonging to Safeway Stores, Inc.

Utah Pie's first customers for its frozen pies were Associated Grocers, Safeway, and Utah Wholesale Grocery. Associated Grocers was the largest and Safeway the second largest buyer of frozen pies in the Salt Lake City market area.

From the latter part of 1957, when Utah Pie first entered the frozen pie business in the Salt Lake City market area, continuously to and including the year 1961, Utah Pie's competitive emphasis was on price. Throughout that period, with the exception of a comparatively few instances hereinafter noted, it offered and sold its frozen pies to retail buyers in that market area at prices substantially lower than prices at which its competitors offered and sold their pies in such market area. As we read the Supreme Court decision in Utah Pie Co. v. Continental Baking Co., supra, Utah Pie had a legal right so to do, even though it captured the extraordinary market volume share of 66.5 per cent in 1958, which approached a monopolistic position, and thereafter was the dominant seller in such market area, with a market volume share of 34.3 per cent in 1959, 45.5 per cent in 1960, and 45.3 per cent in 1961, so long as in so doing it did not violate § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 USCA § 13(a)).

In 1958, Utah Pie sold 75,939 cases of frozen pies; in 1959, 76,744 cases; in 1960, 167,788 cases; in 1961, 205,380 cases; and in 1962, 259,317 cases. During the period 1958

to 1961, inclusive, its volume increased 270.5 per cent and its dollar volume in sales of frozen pies increased from $139,306.24 in the fiscal year ended October 31, 1958, to $407,841.25 in the fiscal year ended October 31, 1961, an increase of 292.8 per cent. During the same four-year period salaries paid the Rigby family engaged in the business increased by approximately $30,000 and net income before taxes, as adjusted, went from a loss of $1,264.51 in fiscal 1958 to a profit in fiscal 1961, before taxes, of $30,597.10. After taxes, it was $19,643.04, which was 28.5 per cent of its net worth.

The following table is a composite picture of the total sales volume and the percentage of market shares of each of the parties hereto and the other competitors in the Sale Lake City market area in the years 1958 to 1961, inclusive.

1958 (Volume in dozens)

Company	Volume	% of Market
Carnation	5,863	10.3
Continental	754	1.3
Utah Pie	37,969.5	66.5
Pet	9,336.5	16.4
Others	3,137	5.5
Totals	57,060.0	100.0

1959

Company	Volume	% of Market
Carnation	9,625	8.6
Continental	3,182	2.9
Utah Pie	38,372	34.3
Pet	39,639	35.5
Others	20,911	18.7
Totals	111,729	100.0

1960

Company	Volume	% of Market
Carnation	22,371.5	12.1
Continental	3,350	1.8
Utah Pie	83,894	45.5
Pet	51,480	27.9
Others	23,473.5	12.7
Totals	184,569.0	100.0

1961

Company	Volume	% of Market
Carnation	20,067	8.8
Continental	18,799.5	8.3
Utah Pie	102,690	45.3
Pet	66,786	29.4
Others	18,565.5	8.2
Totals	226,908.0	100.0[10]

Associated Grocers, which served 150 to 175 retail stores out of its Salt Lake City headquarters, during the period here involved, was the largest buyer of frozen pies in the Salt Lake City market area during that period. Beginning late in 1959 and continuously thereafter, during the period here involved, Utah Pie sold Associated Grocers frozen pies under its controlled label, "Frost 'N' Flame." That pie, identical with the pie marketed by Utah Pie under its "Utah" brand, was exclusive with Associated Grocers and was sold to it at a price 50 to 60 cents per dozen less than Utah Pie charged nonfavored competing purchasers for its "Utah" brand.[11] Associated

[10] In 1962, Utah Pie's sales volume in dozens in the Salt Lake City market area was 129,658.3, as compared with 102,690 dozen in 1961.

[11] Associated Grocers is a cooperative organization. It bought for about 400 stores belonging to the organization "Frost 'N' Flame" brand frozen pies from Utah Pie. It delivered such pies to Associated Grocers, either f.o.b. the latter's warehouse in Salt Lake City or f.o.b. Utah Pie's plant in Salt Lake City. Associated Grocers from such points of delivery transported such pies to such stores, located in Utah, Idaho, and Montana.

Grocers' tremendous competitive advantage, thus attained, caused it to support "Frost 'N' Flame" almost exclusively in its advertising. It also guaranteed Utah Pie's dominant position in the market area by foreclosing effective competition by other frozen pie makers through sales to its largest buyer. "Frost 'N' Flame" quickly replaced "Utah" brand as the leading brand in the Salt Lake City market area.

Utah Pie also produced pumpkin and mince pies for Safeway, the second largest buyer, under Safeway's private label, "Bel-air," at prices substantially below those it charged for its identical pie sold under the "Utah" label to nonfavored competing stores. Utah Pie also continually offered Safeway a preferentially low price on its frozen fruit pies packed under its "Bel-air" label. Safeway rejected those offers, not because of price, but for other reasons fully set out hereinafter. In 1960, its first year of sales of "Bel-air" mince and pumpkin pies to Safeway, Utah Pie charged what it later said itself was a "rock bottom" price, with the hope that it would induce Safeway to drop its then supplier of frozen fruit pies, Pet Milk, in favor of Utah Pie.

In 1961, Utah Pie began selling its controlled label "Mayfresh" pies to Grand Central-American Stores, another of the four largest buyers in the Salt Lake City market area.

Early in 1962, Grand Central acquired American Food Stores, another chain, and thereafter Utah Pie sold its controlled label "Mayfresh" pies to American.

It is abundantly clear from the evidence that a substantial part of Utah Pie's constantly growing volume of

frozen pies sold in the Salt Lake City market area from 1958 to 1961, inclusive, was due to its sales in such market area of its controlled label pies to Associated Grocers, Grand Central Stores, and American Food Stores, and its sales in such market area of private label "Bel-air" pies to Safeway, at prices substantially less than it charged for its identical "Utah" brand, sold to customers generally. In 1959, Utah Pie sold Associated Grocers 18,621 cases of frozen pies; in 1960, Utah Pie sold Associated Grocers 77,894 cases of controlled label "Frost 'N' Flame" frozen pies; and in 1961, Utah Pie sold Associated Grocers 102,834 cases of controlled label "Frost 'N' Flame" frozen pies; whereas the whole number of frozen pies sold in such market area in 1961 was only approximately double what it was in 1959.

The volume of sales of frozen pies greatly increased throughout the period 1958 to 1961, inclusive, not only in the Sale Lake City market area, but in other market areas. Such sales growth was due in substantial part to advertisements by manufacturers of national brands prior to the beginning of such period, which acquainted housewives with the merits and advantages of frozen pies.

As sales volume increased, production costs decreased, and reduction in price normally and naturally followed, apart from any other causes for price decreases.

Over the objections of each of the appellants, Utah Pie introduced its Exhibit 95, which reads as follows:

Over objections of each of the appellants, Utah Pie also introduced its Exhibits 62, 94, and 96 to 101, inclusive, upon which Exhibit 95 is based. Exhibits 62, 94, and 96 to 101, inclusive, are set forth in full in Appendix A, annexed hereto.

The damages which Utah Pie attempted to prove it suffered, because of price discriminations by the appellants, are summarized in Utah Pie's Exhibit 95. It is based on other exhibits set out in Appendix A, which we will hereafter discuss.

Part (A) of Exhibit 95, which was prepared by a certified public accountant for Utah Pie, sets out estimated gross profits Utah Pie claims it would have realized from sales in the Salt Lake City area in 1959, 1960, and the first eight months of 1961 of its "Utah" brand frozen pie (sales of its controlled brands, "Frost 'N' Flame" and "Mayfresh" frozen pies and private brand "Bel-air" frozen pies being excluded) but for the price discriminations in such market area by the appellants.

It sets forth separately the amount of such damages, if the selling price by Utah Pie was $4.30 per dozen, $4.10 per dozen, $3.90 per dozen, and $3.70 per dozen.

The accountant also prepared Utah Pie's Exhibit 96. He sets forth on page 1 thereof, in dozens, the number of frozen pies sold in the Sale Lake City market area, as shown by Utah Pie's Exhibit 62, by Utah Pie and each of the appellants in 1958, 1959, 1960, and 1961, excluding therefrom, however, all of the controlled brands, "Frost 'N' Flame" and "Mayfresh," of frozen pies sold by Utah Pie, and all of Safeway's private brand "Bel-air"

frozen pies sold by Utah Pie and the appellants in such market area during such period.

Basing his computation on the number of frozen pies sold in the Salt Lake City market area by Utah Pie and each of the appellants, set forth on page 1 of Exhibit 96 and derived from Exhibit 62, exclusive of controlled brand and "Bel-air" private brand frozen pies, in each of the years 1958, 1959, 1960, and 1961, the accountant computed and set forth the percentage of market share, respectively, of Utah Pie, Carnation, Continental, and Pet in such market area in each of such years, as follows:

	1958 – % of Total	1959 – % of Total	1960 – % of Total	1961 – % of Total
Carnation	10.87%	14.74%	24.51%	14.67%
Continental	1.40%	4.87%	3.67%	13.75%
Pet	17.32%	21.70%	31.54%	37.94%
Utah Pie	70.41%	58.69%	40.28%	33.64%
	100.00%	100.00%	100.00%	100.00%

Using 1958 as the base year, the accountant also compiled and set forth in the lower part of page 1 of exhibit 96, excluding controlled and private brand frozen pies, the increase or decrease in percentage of market share in the Salt Lake City market area of Utah Pie and each of the appellants in the years 1959, 1960, and 1961, as follows:

Year	Carnation	Continental	Pet	Utah Pie
1958 (Base Year)	10.87%	1.40%	17.32%	70.41%
1959 Increase (Decrease)	3.87%	3.47%	4.38%	(11.72%)
1960 Increase (Decrease)	13.64%	2.27%	14.22%	(30.13%)
1961 Increase (Decrease)	3.80%	12.35%	20.62%	(36.77%)

Since the computations of the accountant, the results of which are set forth on page 1 of Exhibit 96, were based solely on the sales in the Sale Lake City market

area, exclusive of controlled and private brands, made by Utah Pie and the appellants, and do not include the sales of any other sellers in that market area, any decreases in the relative proportions of the "Utah" brand frozen pies sold in such market area in the years 1959, 1960, and 1961 by Utah Pie would necessarily result in relatively proportionate increases in the frozen pies sold by the appellants in the years 1959, 1960, and 1961 in such market area. But that does not establish that such decreases in the proportion of "Utah" brand frozen pies sold in such market area in 1959, 1960, and 1961 were caused by the price discriminations of the appellants. We shall hereinafter undertake to show there was another reason for such decreases in 1960 and 1961.

It should be noted that in the year 1958, used by the accountant as the base year, Utah Pie sold only "Utah" brand frozen pies, and no controlled or private brand frozen pies were sold by it or the appellants.

In 1958, Utah Pie sold 37,969.5 dozen "Utah" brand frozen pies in the Salt Lake City market area and on the basis employed by the accountant had a market share percentage of the total frozen pies, exclusive of controlled brand and private brand frozen pies sold by it and the appellants in such market area, of 70.41 per cent.

In 1959, Utah Pie sold in such market area 38,338 dozen "Utah" brand frozen pies and only 38 dozen "Frost 'N' Flame" controlled brand frozen pies.[12]

[12]Utah Pie first introduced its "Frost 'N' Flame" controlled brand frozen pie late in 1959.

Utah Pie, Carnation, and Continental sold no Safeway private brand "Bel-air" pies in 1959. Pet sold Safeway 25,462.5 dozen "Bel-air" brand frozen pies in 1959.

However, in 1960 a market change took place. In that year, Utah Pie sold only 36,759.5 dozen "Utah" brand frozen pies in the Salt Lake City market area, and its market share percentage of "Utah" brand pies, on the basis employed by the accountant, decreased 30.13 per cent. But in that year, Utah Pie sold in such market area to Associated Grocers 37,189.5 dozen of its controlled brand "Frost 'N' Flame" frozen pies, and in that year Associated Grocers, which in 1958 and 1959 was a large volume purchaser of "Utah" brand pies, purchased only an insignificant number of "Utah" brand pies.

In 1960, Utah Pie also sold in such market area 9,945 dozen "Bel-air" private brand pies to Safeway. It will be observed that in 1960, in such market area, Utah Pie's sales of its controlled brand "Frost 'N' Flame" frozen pies exceeded its sales of its "Utah" brand frozen pies, and its sales of its controlled and private brand frozen pies exceeded its sales of its "Utah" brand pies by 10,375 dozen.

An even greater change took place in 1961. In that year, a year of a very substantial increase in volume of the frozen pies sold in the Salt Lake City market area, Utah Pie sold 46,016 dozen of its "Utah" brand pies and its market share percentage, on the basis employed by the accountant, decreased 36.77 per cent. In 1961, Associated Grocers purchased only an insignificant number of "Utah" brand pies. But in that year in such market area, Utah Pie sold 48,963.5 dozen of its controlled brand

"Frost 'N' Flame" frozen pies to Associated Grocers and 1,177.5 dozen of its controlled brand "Mayfair" frozen pies to Grand Central-American Stores and 6,533 dozen private brand "Bel-air" frozen pies to Safeway, and the aggregate of Utah Pie's sales of controlled and private brands exceeded its sales of "Utah" brand frozen pies by 10,658 dozen.

Not only did Associated Grocers restrict its purchases from Utah Pie of frozen pies in 1960 and 1961 almost entirely to the "Frost 'N' Flame" controlled brand, its advertising of frozen pies in those years was almost entirely limited to "Frost 'N' Flame" frozen pies.

Also, it will be noted from the table appearing at pages 18 and 19 of this opinion that Utah Pie's market share percentage of the total sales in the Salt Lake City market area of frozen pies, which was 66.5 per cent in 1958, fell to 34.3 per cent in 1959, then rose to 45.5 per cent in 1960 and 45.3 per cent in 1961, whereas the market share percentage of sellers of frozen pies in such market area, other than Utah Pie and the appellants, which was 5.5 per cent in 1958, was 18.7 per cent in 1959, 12.7 per cent in 1960, and 8.2 per cent in 1961.

Notwithstanding the facts we have above recited, with respect to the changes that took place in 1960 and 1961, Gaylen S. Rigby testified it was his opinion that, but for the price discriminations of the appellants, the sales of 37,189.5 dozen in 1960 and 48,963.5 dozen in 1961 of "Frost 'N' Flame" brand frozen pies to Associated Grocers and the reduction of Associated Grocers' purchases of "Utah" brand frozen pies to an insignificant number in each of those years would not have affected or de-

creased the sales of "Utah" brand pies in such market area in those years, and that Utah Pie would have continued to maintain a market share percentage of 70.41 per cent of the frozen pies sold by it and the appellants, exclusive of controlled and private brand frozen pies, through the sale of more "Utah" brand pies to other buyers in such market area.

Moreover, Rigby was assuming that, absent such discriminations, Utah Pie would have continued to sell "Utah" brand frozen pies at not less than $3.70 per dozen in 1960 and 1961, which would have made the prices of sellers in the market area, other than the appellants, more competitive, and they would undoubtedly have increased their sales of frozen pies.

We believe the conclusion is inescapable that the failure of Utah Pie to maintain in 1960 and 1961 the market share percentage of frozen pies, exclusive of controlled and private brand frozen pies, sold by it and the appellants in the Salt Lake City market area in 1958, which on the basis employed by the accountant was 70.41 per cent, was due in a very large part to the fact that Associated Grocers, theretofore the largest purchaser of "Utah" brand frozen pies in such market area, purchased only an insignificant number of "Utah" brand pies in 1960 and 1961; and that it was not due in substantial part to any relative increase of sales in such market area in 1960 and 1961 by the appellants of their brands of frozen pies.

The market share percentage decrease of only 11.72 per cent in 1959 of Utah Pie, when Associated Grocers was a large volume buyer of "Utah" brand pies and the

much larger market share percentage decreases of 30.13 per cent in 1960 and 36.77 per cent in 1961, years in which Associated Grocers purchased only a very small number of "Utah" brand pies, bears out our conclusion.

The fact is unescapable that Utah Pie's "Utah" brand, which was the volume leader in such market area in 1958 and 1959, was supplanted by Utah Pie's "Frost 'N' Flame," which became the volume leader in 1960 and continued to be in 1961.

The accountant, having determined that Utah Pie's market share percentage of frozen pies sold in the Salt Lake City market area by it and the appellants in 1959, exclusive of controlled and private brand frozen pies, was 58.69 per cent, divided the total number of frozen pies, exclusive of controlled and private brand frozen pies, sold in such market area by Utah Pie in 1959, which was 47,127 dozens, by such percentage to ascertain the number of frozen pies in dozens which equalled one per cent. He then multiplied the quotient by 100 to ascertain 100 per cent in dozens, which was 80,298 dozens. He then multiplied 80,298 by 70.41 to ascertain the number of dozens of frozen pies, exclusive of controlled and private brand frozen pies, which Utah Pie would have sold in 1959 in such market area, had it maintained in 1959 the 70.41 per cent market share it had in 1958, which he found to be 56,538 dozens. By subtracting the actual number of dozens sold in 1959 from 56,538, he arrived at the number of sales in dozens of frozen pies Utah Pie claimed it lost in that year because of the price discriminations of the appellants, which was 9,411 dozens.

By like calculation he found that the sales loss claimed by Utah Pie of "Utah" brand frozen pies in such market area in 1960 was 34,218 dozens, and in 1961 was 34,350 dozens. (See Exhibit 96, page 2.)

Basing his calculations on a cost study of frozen pies sold by Utah Pie, made by a Mr. Zimmerman for the appellants, he arrived at what he said was a weighted average of Utah Pie's "actual cost of manufacture" of "Utah" brand pies. He then computed the amount of gross profits Utah Pie would have realized, had it sold such additional frozen pies at prices of $4.30, $4.10, $3.90, and $3.70 per dozen, respectively, by deducting such cost of manufacture from such sales prices, and he then allocated a share of such gross profits as damages to each of the appellants. (See Exhibit 96, page 5 and Exhibit 95, part (A).)

No deductions usually taken from gross profits in arriving at net profits were considered, since Gaylen S. Rigby testified that had Utah Pie made such additional sales there would have been no increase in its overhead.

Gaylen S. Rigby testified that in his opinion Utah Pie, by reason of the price discriminations of the appellants, suffered damages for injury to its good will of $75,000. He gave no underlying facts, aside from hypothetical predictions of what would have happened, absent such discriminations, for his claim of damages for injury to good will, and gave no basis for allocating such claimed damages among appellants. Under instructions from counsel for Utah Pie, the accountant allocated such claimed damages equally among the appellants. (See Exhibit 95, part (G).)

It will be observed that the jury returned a verdict against Carnation of $29,277, which is exactly $10,000 more than the $19,277 damages allocated to Carnation on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; that it returned a verdict of $24,994 against Continental, which is exactly $10,000 more than the $14,994 damages allocated to Continental on the $3.70 per dozen sales price basis in part (A) of Exhibit 95; and that it returned a verdict of $44,197 against Pet, which is exactly $10,000 more than the $34,197 damages allocated to Pet on the $3.70 per dozen sales price basis in part (A) of Exhibit 95. (See also Exhibit 96, page 5.)

The only damages allocated equally among the appellants were the claimed damages for injury to good will in part (G) of Exhibit 95. Hence, it is perfectly clear that the jury based its damages award for loss of sales on the last line of part (A) of Exhibit 95.

In presenting its case for loss of profits in part (A) of Exhibit 95, Utah Pie treated all of the price discriminations of the several appellants as constituent parts of a single whole, or as joint acts of the appellants. That would have been proper, had Utah Pie established its conspiracy claim, but the jury returned a separate verdict against Utah Pie on its conspiracy claim against all three of the appellants.

Hence, each appellant was liable only for the injuries caused by its first § 2(a) violation and its § 2(a) violations thereafter, and it was not liable for injuries caused by the § 2(a) violations of the other two appellants.

From the foregoing and the charts set out in Appendices II, III, IV, V, VII, and VIII, annexed to our former

opinion, and the tables which are set forth in that opinion at pages 134, 135, 137, and 144 of 349 F.2d, the following will appear:

Utah Pie was the first and arch price cutter in the Salt Lake City market area; it engaged in price cutting to obtain and retain frozen pie customers in the Salt Lake City market area continuously from the time it entered the frozen pie business to the end of the period here involved; lower prices were the principal means it employed to obtain and hold customers, and it used such means very effectively. Through them it obtained the patronage of the three largest retailers in such market area. By the use of controlled labels, it effectively tied two of such major retailers to it as their sole supplier of frozen pies.

It very substantially increased its sales volume in such market area from year to year, including the year 1962, and in each of the years 1958 to 1961, inclusive, it had a very high percentage share of the total sales volume in such market area.

However, as we stated, supra, we understand the decision of the Supreme Court to hold that Utah Pie had the right so to reduce its prices for its frozen pies, so long as it did not violate § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Utah Pie's claims of damages suffered by it, reflected in parts (B), (C), and (D) of Utah Pie's Exhibit 95, require little discussion. They were based on conjecture and were highly speculative in character. Its proof, in our opinion, did not establish that it suffered any damages in the categories reflected in such items. The jury evidently so regarded Utah Pie's proof with respect to

those items, because it awarded no damages to Utah Pie on any of its claims reflected in parts (B), (C), and (D).

Safeway did not purchase any "Bel-air" frozen fruit pies from Utah Pie in 1959, 1960, and 1961. That, because Safeway was not able to persuade Utah Pie to install means and procedures that would effect uniform quality control and insure that the specifications and standards Safeway required of a manufacturer with respect to its "Bel-air" frozen fruit pies would be met and that defective pies bearing the "Bel-air" label would not reach Safeway's shelves.

Safeway did purchase "Bel-air" frozen mince and pumpkin pies from Utah Pie in 1960 and 1961. During 1960, Safeway discovered that the "Bel-air" frozen pumpkin pies delivered to it by Utah Pie exceeded the maximum moisture content specified by Safeway and agreed to by Utah Pie and further discovered that the "Bel-air" frozen pumpkin and mince pies delivered to it by Utah Pie did not meet the requirements with respect to ingredients specified by Safeway and agreed to by Utah Pie. Safeway again, without avail, urged Utah Pie to install means and procedures in its plant that would insure quality control and the delivery to it of frozen pies that would meet the "Bel-air" quality standards insisted on by Safeway.

Moreover, prior to December 1960, Safeway requested Utah Pie to install and Utah Pie agreed to install a coding device by which Safeway could pinpoint the date and time of production of defective pies delivered to it by Utah Pie, but Utah Pie failed to install such coding device, and as late as August 1961, advised Safeway it had not taken any steps so to do.

The primary reason that Safeway was insisting on Utah Pie installing such means and procedures to insure quality control was that Safeway was unwilling to risk damage to the fine reputation it was building up for "Bel-air" frozen fruit pies by the maintenance of the continued high quality of such pies through unwitting sales by it of "Bel-air" pies, the quality of which fell below such high standards.

In 1960, Safeway purchased 4,608.5 dozen "Bel-air" frozen mince pies and 5,336.5 dozen "Bel-air" frozen pumpkin pies from Utah Pie. However, in 1961, Safeway purchased only 50 dozen "Bel-air" frozen mince pies, but it purchased 6,483 dozen "Bel-air" frozen pumpkin pies from Utah Pie in that year. The reasons for the decrease in the number of frozen mince pies purchased in 1961 were these: Safeway requested Utah Pie to pack the frozen mince pies to be made by it for Safeway in 1961 in a new type of carton. Utah Pie advised Safeway it would not do so, unless it was given Safeway's frozen fruit pie business, then going to Pet. That Safeway would not do, for the reasons indicated above. As a result, Safeway purchased only 50 dozen frozen mince pies from Utah Pie in 1961, just enough to permit it to use up the old cartons and shipping cases it had on hand.

Thus, it will be seen that Safeway's unwillingness to purchase frozen "Bel-air" pies from Utah Pie was due to Utah Pie's refusal to meet Safeway's requirements with respect to quality controls, coding device, and type of carton used.

The facts stated above, with respect to the reasons Safeway did not purchase any frozen fruit pies from Utah

Pie and purchased only a few frozen mince pies from it in 1961, in large part appear from the testimony of Alan W. Young, Manager of Safeway's Frozen Food Department. But we do not rest our statement on his testimony. The facts we stated were clearly and fully established by written correspondence in the form of letters from Young to Utah Pie and Utah Pie to Young, introduced as exhibits in the trial below, and which Utah Pie wholly failed to show were in any particular either inaccurate or incomplete.

While Safeway would not purchase frozen fruit pies packed under its "Bel-air" label from Utah Pie for the reasons stated above, it was a large purchaser of other frozen pies from Utah Pie. Utah Pie's sales of other frozen pies to Safeway were approximately 31,500 dozen in 1958, 16,500 dozen in 1959, 22,000 dozen in 1960, and 18,000 dozen in 1961.

With respect to Utah Pie's claim for damages, reflected in part (E) of Exhibit 95, we think it quite clear that because Utah Pie was unwilling to meet Safeway's requirements as to quality control and coding device, as stated above, Safeway would not have purchased from Utah Pie "Bel-air" frozen fruit pies at any price; and because "Bel-air" frozen pumpkin pies delivered to Safeway by Utah Pie at times did not meet Safeway's requirements as to maximum moisture content, and "Bel-air" frozen mince pies delivered by Utah Pie to Safeway at times did not meet Safeway's specifications as to ingredients, and Utah Pie's unwillingness to install quality controls, Safeway would not have paid its contract price to Utah Pie for "Bel-air" frozen pumpkin and mince pies.

The jury apparently reached the same conclusions, because it awarded no damages to Utah Pie on its part (E) claim.

Utah Pie's claim for damages, reflected in part (F) of Exhibit 95, is predicated on the assumption that Utah Pie would have sold as many "Utah" brand pies in the Salt Lake City market area at prices of $3.70 or more per dozen as it did at $3.10 to $3.60 per dozen. That assumption also is conjectural and speculative and the jury apparently so concluded, because it did not award Utah Pie any damages on its part (F) claim.

We will refer further to Exhibit 95 and the exhibits on which it is based when we take up separately the appeals of each appellant.

We shall next consider each of the several appeals separately.

II

No. 7306—The Continental Appeals

Continental's counterclaim was based upon the differences between the prices for which Utah Pie systematically sold frozen pies to retail chain stores and the substantially higher prices for which it sold them to other customers in the Salt Lake City market area. Such differences resulted from the sales by Utah Pie under private and controlled labels to favored customers, which began late in 1959. Under those labels, Utah Pie sold its only size, grade, and quality of pies to the large favored buyers at substantially lower prices than other buyers were required to pay for Utah Pie's regular "Utah" brand.

For example, in mid-1960 Utah Pie was selling its "Utah" brand frozen pie for $3.60 per dozen, while it was selling an identical pie under its "Frost 'N' Flame" brand exclusively to Associated Growers at $3 per dozen. And on April 4, 1960, Utah Pie by letter offered to sell Safeway, packed under its "Bel-Air" label and delivered to its warehouse in Salt Lake City, frozen apple pies at $3 per dozen and frozen cherry and boysenberry pies at $3.30 per dozen. It was also selling at that time its "Sonny Boy" brand frozen pies for $2.88 per dozen, f.o.b. Salt Lake City, for delivery to buyers in Spokane.

Beginning late in 1959 and continuing thereafter, during the period here involved, Utah Pie sold Associated Grocers frozen pies under its controlled label, "Frost 'N' Flame." That pie, identical with the pie marketed by Utah Pie under its "Utah" brand, was exclusive with Associated Grocers and was sold at a price 50 to 60 cents per dozen less than Utah Pie charged nonfavored competing purchasers for its "Utah" brand. Associated Grocers' tremendous competitive advantage, thus attained, caused it to support "Frost 'N' Flame" almost exclusively in its advertising. It also guaranteed Utah Pie's dominant position in the market by foreclosing effective competition through sales by others to its largest buyer. "Frost 'N' Flame" quickly replaced "Utah" brand as the leading brand in the Salt Lake City market area.

Utah Pie also produced pumpkin and mince pies for Safeway, the second largest buyer, under Safeway's private label, "Bel-air" brand, at prices substantially below those it charged for its identical pie sold under its "Utah" label to nonfavored competing stores. Utah Pie

also continually offered Safeway a preferentially low price on its frozen fruit pies packed under its "Bel-air" label. Safeway rejected those offers, not because of price, but for the reasons fully set out, supra, in this opinion. In 1960, its first year of sales of "Bel-air" mince and pumpkin pies to Safeway, Utah Pie charged what it later said itself was a "rock bottom" price, with the hope that it would induce Safeway to drop its then supplier, Pet Milk, in favor of Utah Pie.

In 1961, Utah Pie began selling its controlled label "Mayfresh" pies to Grand Central-American stores, another of the four largest buyers in the Salt Lake City market area.

The adverse impact on Utah Pie's competitors was very substantial. From the time Utah Pie gave Associated Grocers its controlled label preference, Continental was unable to sell Associated Grocers a single pie. After Utah Pie began its controlled label sales to Grand Central Stores, Continental was unable to sell that company, and when the arrangement was extended early in 1962 to American Food Stores, which had been acquired by Grand Central, Continental lost the only chain that had been a more or less steady customer. Similarly, as to Safeway, Continental was unable to make a single sale to it until June 1961. In that month it made a sale to Safeway's food stores in Salt Lake City, which we will deal with more particularly later.

Continental enjoyed substantial sales in the Salt Lake City market area in 1957, but from 1958 to 1960, inclusive, it was a negligible competitor in that market area. With the advent of Utah Pie as a competitor in 1958,

Continental's volume in dozens fell to 754 and its market share to 1.3 per cent. In 1959, its volume of sales in dozens was 3,182 and its market share 2.9 per cent. In 1960, its volume of sales in dozens was 3,350 and its market share 1.8 per cent.[18] In 1961, its sales increased and its total volume of sales in dozens in that year was 18,799.5 and its market share 8.3 per cent, but by the beginning of the fourth quarter of 1960, Continental had reduced the cost of its pies laid down in Salt Lake City to a point where it could more nearly compete with Utah Pie's prices in the Salt Lake City market area.

After the entry of Utah Pie into the Salt Lake City market in 1957, with its lower priced pies, Continental, because of its higher costs of production and transportation, was unable to keep its prices even for its smaller pie competitive with Utah Pie's prices. In 1960, with the advent of Utah Pie's controlled and private label prices, Continental ceased to maintain a sales representative in the Salt Lake City market area and was virtually out of that market. However, Continental continued in an effort to reduce its costs of production in order to become competitive. In 1960, it was successful in locating a "co-packing" operation in the heart of the California fruit growing region, which permitted fruit to be processed directly from the trees into the finished pie, without large intermediate packaging, storing, and shipping expenses. By such efforts, Continental was able to reduce its cost

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[18]In its opinion in Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, at 698, the Supreme Court observed:

"• • • Continental was a substantial factor in the market in 1957. But its sales of frozen 22-ounce dessert pies, sold under the 'Morton' brand, amounted to only 1.3% of the market in 1958, 2.9% in 1959, and 1.8% in 1960. • • •"

of apple pies laid down in Salt Lake City from approximately $3.75 per dozen in 1958 to approximately $2.80 per dozen in the second quarter of 1961. It was also able to reduce its costs of other flavors laid down in Salt Lake City in comparable amounts. Having thus reduced its costs, Continental was again in a position to offer its "Morton" brand pies to buyers in the Salt Lake City market area at prices which it hoped might prove to be competitive. In October 1960, Continental contracted with a Salt Lake City food broker in an effort to resume distribution of its full line of "Morton" brand frozen food products in the Salt Lake City market. For seven months, from November 1960 to June 1961, the broker attempted to sell Continental frozen pies at prices generally competitive with Utah Pie's "Utah" brand.

During that period the broker called on the trade throughout the Salt Lake City market area, offering various short term price concessions in the form of advertising allowances on frozen pies, as well as other products in the Continental line. On the frozen pies, these price concessions ranged from $1.20 per dozen off the $4.50 list price on mince pies to 84 and 70 cents per dozen off the $4.00 list price on apple, cherry, and boysenberry pies, respectively. At these net prices, Continental was able to make only a total of seven sales to three small buyers in the outlying areas of Ogden, Boise, and Pocatello. It could not make sales to the major buyers, all located in Salt Lake City. The few sales it made did not adversely affect Utah Pie. During those seven months, Continental's best price offers, made on the price-per-ounce basis used by professional buyers in comparing prices, were

competitive with prices offered by Utah Pie on its "Utah" brand. By June 1961, it seemed apparent that if Continental was to recapture any portion of the market, it had to make better offers.

Continental was unable to sell to small buyers in the Salt Lake City market area, because they lacked the refrigerated storage space necessary to buy direct from Continental. Continental could sell not less than a quarter of a truckload. Utah Pie, with its plant in Salt Lake City, was the only manufacturer who could feasibly sell directly to the small buyers. Of the largest buyers, Associated Grocers was handling "Frost 'N' Flame" brand at $3.10 per dozen, the lowest price on the market; Grand Central was about to close a deal with Utah Pie for its controlled label, "Mayfresh," at the same prices charged Associated Grocers; and Safeway was buying its "Bel-air" brand frozen fruit pies exclusively from Pet Milk, from whom it could purchase three brands, including its own private label, in combined truckload shipments. Confronted with that situation, Continental's broker recommended that it meet the price being charged to Associated Grocers and offered to Grand Central, by offering apple pies at $2.85 per dozen on full truck quantities. This was approximately the ounce-for-ounce equivalent of Utah Pie's $3.10 per dozen price. Indeed, Continental's price was 1.08 cents per ounce for its pies, and Utah Pie's price for its pies was 1.07 cents per ounce. In comparing Continental's prices with Utah Pie's prices, the fact that Continental's pies were 22 ounces in weight and Utah Pie's pies were 24 ounces in weight should be taken into consideration. Professional buyers evaluate competing

offers on a price-per-ounce basis, although retail purchasers do not always give attention to the difference in the size of pies. Moreover, Continental's price was for full truck orders, only, while Utah Pie's price applied to orders of any size, down to a few dozen.

Continental approved the recommendation of its broker, and a $2.85 to $2.89 delivered price, depending on quantity ordered, for frozen apple pies was offered for a two-week period to a few buyers potentially able to buy from Continental. At the same time, Continental extended on a continuing basis for the Salt Lake City market area an offer of 30 cents per dozen freight allowance. At those prices, Continental made sales to American Food Stores in Ogden and to Associated Grocers, a small independent branch in Pocatello, both of which had previously purchased "Morton" pies, and at the time of the sales were not purchasing from Utah Pie.

In June 1961, the merchandising manager for Safeway's food stores in Salt Lake City purchased 6,250 dozen frozen apple pies, their requirement for five weeks, from Continental,[14] and in July 1961 Grocers Wholesale of Salt Lake City, a small wholesaler just starting in business, ordered 1,000 dozen frozen pies from Continental.

Utah Pie responded to Continental's offer, which lasted only two weeks, and was once renewed a month later for

[14]Young, the Safeway Frozen Food Department Manager, testified that he had no control over the brands of frozen fruit pies that Safeway Division Managers purchased for their stores; that they were "autonomous" in their purchases"; and did not have to stock "Bel-air" pies; that he had to "sell them on Bel-air."

the same period, by reducing its price on all of its 24-ounce apple pies, whatever the brand name, to $2.75 per dozen and offering all the customers unlimited quantities, to be delivered in lots of any size. It continued so to do until December 1, 1961, when it raised its price to $2.95 per dozen. Gaylen S. Rigby testified that Utah Pie realized a profit in its sales of frozen apple pies at $2.75 per dozen.

When Continental learned of Utah Pie's price reduction, and the merchandising manager for Safeway's Food stores in Salt Lake City urged it to further reduce its price, it agreed with him to cancel an order he had already placed at the $2.85 price; and also offered to cancel another order placed by American Food Stores, rather than reduce its price to Utah Pie's offer, but American Food Stores did not elect to cancel its order.

During the period 1958 to 1962, inclusive, in the Salt Lake City market area, Continental reached its highest sales volume in June and July 1961. Thereafter, its sales volume continuously decreased through 1962. In 1962, its sales volume was 8,685 dozen less than its 1961 volume. June and July 1961 were also high sales volume months for Utah Pie, higher than any of the five preceding months and many other earlier months; and from July 1961, on through 1962, its sales volume continued to increase. Its sales volume reached a new annual high in 1962, when it showed an increase of 26,968.3 dozen over 1961. Thus, it will be seen that Utah Pie effectively maintained its dominant position and discouraged further efforts by Continental to meet the low prices which Utah Pie continued to maintain throughout 1961 and 1962.

Continental was able in 1961 to increase its volume to 18,799.5 dozen and its market share percentage to 8.3, but in 1962 its volume dropped back to 10,114.5 dozen, while Utah Pie's volume in that year was 129,658.3 dozen, an increase of 26,968.3 dozen over 1961. The record does not reflect facts from which the market share percentage can be computed in 1962.

The following table graphically shows a comparison of Utah Pie's and Continental's respective sales volume and market share percentage for the years 1958 to 1961, inclusive, and the sales volume for 1962[15] in the Salt Lake City market area.

		Sales Volume in Dozens	% of Market
1958	(Utah Pie	37,969.5	66.5
	(Continental	754	1.3
1959	(Utah Pie	38,372	34.3
	(Continental	3,182	2.9
1960	(Utah Pie	83,894	45.5
	(Continental	3,350	1.8
1961	(Utah Pie	102,690	45.3
	(Continental	18,799.5	8.3
1962	(Utah Pie	129,658.3	
	(Continental	10,114.5	

The evidence clearly established that in the Salt Lake City market area during the period 1958, 1959, 1960, and the first five months of 1961, Continental generated no competition with Utah Pie and did not cause Utah Pie to reduce its prices for its frozen pies. Gaylen S. Rigby so conceded in his testimony at the trial below.[16] Those

[15]Percentage of market for 1962 cannot be determined from record.

[16]Gaylen S. Rigby testified that the only time Utah Pie reduced its prices to meet a price reduction by Continental was its price reduction of $2.75 per dozen for frozen apple pies, made in June

facts no doubt caused the Supreme Court to observe in its opinion in these cases in Utah Pie Co. v. Continental Baking Co., supra, at page 698: "Then in June 1961, it took the steps which are the heart of petitioner's (Utah Pie) complaint against it (Continental)."

Hence, there were no § 2(a) violations by Continental in the Salt Lake City market area in the years 1958, 1959, 1960, and the first five months of 1961, but the proof of Utah Pie's damage claims, reflected in part (A) of Exhibit 95 and the exhibits in Appendix A on which part (A) of Exhibit 95 is based, particularly pages 1, 2, and 3 of Exhibit 96, were predicated on the assumption that Continental committed violations of § 2(a) in 1959 and 1960, which caused loss of sales by Utah Pie, which sales it would have made at prices of $3.70 per dozen or greater. Such assumption was clearly unfounded and it was manifest error to permit part (A) of Exhibit 95 and its supporting exhibits to be received in evidence against Continental.

Aside from the damages awarded by the jury to Utah Pie for loss of good will, the jury's verdicts in favor of Utah Pie were all based on part (A) of Exhiibt 95 and its supporting exhibits.

Since Continental's § 2(a) violations were confined to two months in 1961, whereas Pet's and Carnation's § 2(a) violations extended over a much longer period of time, it was grossly unfair to Continental for the accountant, acting pursuant to the direction of counsel for Utah Pie,

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1961; and that all its other price reductions were made because of price reductions by Pet or Carnation. He further testified that up to June 1961 Continental caused Utah Pie no "competitive difficulty."

arbitrarily to allocate to Continental the same amount for loss of good will as it did to each of the other appellants. Hence, the jury's award against Continental, based on such allocation, of the same amount awarded against Pet and Carnation for loss of good will was grossly unfair and, likewise, was not supported by any underlying factual basis.

In view of the Supreme Court's decision in these cases, we must assume that Continental's offers and sales in June and July 1961 did violate § 2(a). That being so, we do not think it can be said as a matter of law that Utah Pie suffered no damages proximately caused by such violation.

The record clearly established and the jury found that there was no conspiracy, no concert of action by the appellants. Each appellant pursued its own course and competed with the other two.

What we have said clearly demonstrates the reasons, the conspiracy charge having been eliminated, why the cases should be presented separately against each appellant, even though consolidated for trial. In other words, to avoid confusion and to be fair to each of the appellants, Utah Pie, to meet its burden of proof,[17] should introduce:

1. Its evidence of general application in all three cases;

2. The proof on which it relies to show violations of § 2(a) by one of the appellants;

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[17] Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, cert. den. 363 U.S. 843; American Can Co. v. Russellville Canning Co., 8 Cir., 191 F.2d 38, 54.

3. The proof on which it relies to establish that it was damaged by such violation by such appellant;

4. Proof by which the jury could make a reasonably approximate estimate of the amount of such damages.

Then such appellant should present its defense to the claim against it. The same course should then be followed as to the § 2(a) claims against the other two appellants.

This means that Utah Pie must prove its damages against each appellant separately and should not be permitted to introduce evidence to establish a claim of damages in one lump sum and then distribute it to the several appellants.

Utah Pie's claim of damages against Continental in the Salt Lake City market area should be definitely tied to its § 2(a) violations which occurred in June and July 1961.

We think if the order of proof we have indicated is followed, Continental's counterclaim could also be presented when Continental presents its defense to Utah Pie's § (2(a) claim against it.

We deem no useful purpose would be served by a discussion by us of the instructions offered and refused, or those given. No doubt, on a new trial the charge to the jury will be recast to conform to the views expressed in the opinion of the Supreme Court and in this opinion.

Finally, we do not think, in view of the course these cases have taken, that Continental should be held debarred from proving full compensatory damages on its counterclaim.

III

No. 7309—The Pet Appeal

Pet is a corporation engaged in the manufacture and sale of food products, including frozen pies. Its main office is in St. Louis, Missouri. Its frozen pie manufacturing plants are located in Frankfort, Michigan, Chambersburg, Pennsylvania, and Fresno, California.

Pet sells and distributes its pies from its three plants, throughout the United States. From 1958 to 1962, inclusive, it was a competitor of Utah Pie in the Salt Lake City market area. Pet entered the frozen pie business in 1955, by the acquisition of a frozen pie plant at Beulah, Michigan. Initially, its pies were made in four flavors and distributed in a relatively small north central territory, the Detroit-Chicago-Milwaukee area. In order to expand its frozen pie business nation-wide, Pet moved its plant from Beulah to Frankfort, and then in 1956 acquired its plant at Fresno, and in 1957 its plant at Chambersburg. It marketed its pies under the brand "Pet-Ritz." It added new flavors and undertook to accelerate consumer acceptance and demand through an extensive advertising campaign, which emphasized the quality of its pies. This advertising included advertisements in local newspapers, distribution of coupons that might be used in purchasing pies, and demonstrations in grocery stores to show how easily the pies could be prepared for consumption. It also included a large expenditure for advertising on a half-hour television program which starred Red Skelton.

Soon after Pet entered the frozen pie industry, the nature of the market began to change. As frozen pies be-

came more and more in demand, numerous regional or local companies, such as Utah Pie, entered the business. Because of the freight advantage which they had over the national companies like Pet, whose products usually had to be shipped into a region from a considerable distance, the local and regional companies were able to sell at lower prices than the national companies had been charging. Emphasis in many regional markets shifted from quality to price, and price became the principal factor of competition. With the large increase in volume of sales of frozen pies and the increase of price competition, prices of frozen pies declined throughout the United States.

During 1957 and 1958, while prices were declining and the market was rapidly expanding, Pet's sales of frozen pies did not keep pace with the expanding market. In the Salt Lake City market area, total sales in 1959 were 1.96 times total sales in 1958, while sales of "Pet-Ritz" pies were 1.52 times their sales in 1958; total sales in 1960 were 1.64 times total sales in 1959, while "Pet-Ritz" sales were 0.58 times their sales in 1959; and total sales in 1961 were 1.24 times total sales in 1960, while "Pet-Ritz" sales were 0.45 times their sales in 1960.

During the period from 1958 to 1961, inclusive, the total sales of "Pet-Ritz" pies were the following percentages of all brands of frozen fruit pies sold in the Salt Lake City market area: 1958—16.4 per cent; 1959—12.7 per cent; 1960—4.5 per cent; 1961—1.7 per cent. The decrease was due to the fact that other brands were being sold below the "Pet-Ritz" price in that market.

When Pet realized that advertising efforts were not enough to check its continuing decrease in sales, it made William N. Harsha, who had been the Managing Director of Pet's Canadian corporation, General Manager of the Pet-Ritz Frozen Foods Division and directed him to study its operations and financial and production problems. As a result of such study, Harsha decided to curtail the advertising and effect economies by eliminating duplication in overhead, increasing processing efficiency, improving production methods, reducing warehouse costs, and reducing freight costs by better scheduling of deliveries.

Pet also decided to make an analysis of the frozen pie market to determine what kind of pie the housewife preferred. It was then known that the housewife was price conscious, but Pet, having spent large sums in advertising the "Pet-Ritz" brand as a quality product, did not want to reduce the quality of that pie to enable it to compete with lower priced pies. As a part of the effort to analyze the market, a research director was employed, who began his studies in June 1959. Soon thereafter, the Market Research Corporation of America was engaged by Pet to make a study to help it decide whether or not to add a smaller and lighter economy brand of frozen pie. The results of these studies indicated that there was a market for a frozen economy pie and Pet introduced its "Swiss Miss" pie in Denver in April 1960, and elsewhere in the United States, including Utah, in August 1960. "Swiss Miss" is an eight-inch, 20-ounce pie. Utah Pie's brands are all eight-inch, 24-ounce pies. While it did not enable Pet to fully meet the price competition, it enabled it to

compete more effectively, regain some of its major chain customers, and improve the profit picture of its frozen foods operation.

Simultaneously with Pet's efforts to cut costs and improve volume of sales, in 1958 it began to reduce its advertising expenditures for frozen pies. From $866,116 in 1959, its advertising expenditures were reduced to $337,510 in fiscal 1961, and to $42,562 in fiscal 1962.[18]

In addition to adding the lighter weight, lower priced "Swiss Miss" to its line of frozen pies to improve its competitive position, Pet also entered into negotiations with Safeway for the production of frozen fruit pies under the "Bel-air" label. It sold Safeway 25,462.5 dozen "Bel-air" frozen fruit pies in 1959.

On December 24, 1959, Pet and Safeway entered into a contract whereby Pet agreed to furnish Safeway with its requirements of frozen fruit pies for its nation-wide chain of food stores for the year 1960. Under the contract, Safeway agreed to purchase and Pet agreed to furnish during such year not less than 500,000 dozen and not more than 1,000,000 dozen frozen fruit pies, and shipments were to be made from the plant of Pet nearest to the point of delivery to Safeway.

The prices stipulated in the contract for the various frozen fruit pies and for frozen mince and pumpkin pies were less than those for which Pet was selling substantially the same product to customers other than Safeway.

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[18]On April 1, 1960, Pet changed its fiscal year for accounting purposes from the calendar year to a year ending March 31. Consequently, there is no fiscal 1960 in its accounting.

Safeway regularly followed the practice of requiring the sellers of commodities to it to justify any price differentials allowed Safeway by showing a cost difference. Consonant with that requirement, Pet, by the terms of the contract, represented and warranted to Safeway that the differentials thus allowed Safeway in the contract only made due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such pies would be sold or delivered to Safeway. (See 15 USCA § 13(a).)

The contract further provided that on or about July 1, 1960, Pet would review its pricing and cost structures to determine whether the prices stipulated in the contract should be revised upward to reflect possible changes in the cost of manufacture, sale, or delivery necessary to justify such differentials.

The contract required Pet to maintain adequate quality controls, to permit inspection by Safeway's representative in Pet's plants during the course of production, processing, manufacture, and storage of the pies to be delivered to Safeway under the contract. It further required Pet to furnish to Safeway sample pies marked as to the time, date, or lot from which they were drawn, and gave Safeway the right to reject any lot or any pies which did not meet Safeway's specifications.

Pet furnished Safeway satisfactory proof justifying the differentials allowed it. At the trial below, Pet introduced evidence for the purpose of showing that the differentials allowed Safeway under the contract were justified by differences in the cost of manufacture, sale, or delivery of pies produced and sold by Pet to Safeway,

resulting from different methods employed or quantities sold and delivered. The Supreme Court, however, held that such proof was incomplete and inadequate to establish justification for such differentials. (See 386 U.S. 694, 695.) However, Pet will have an opportunity to undertake to introduce evidence at a new trial that will meet the requirements of adequate proof of justification laid down by the Supreme Court.

The "Pet-Ritz" frozen pies were always sold in the Salt Lake City market area at prices substantially higher than the prices at which the frozen pies of Utah Pie, all of which were of the same weight and quality as "Pet-Ritz," were sold by Utah Pie in such market area.

In August 1960, when the first "Swiss Miss" frozen apple pie was sold in the Salt Lake City market area, its price was $3.29 per dozen. At the same time, the larger and heavier "Frost 'N' Flame" frozen apple pie of Utah Pie was sold at a price of $3.00 per dozen. Thereafter, during the period covered by this action, the "Swiss Miss" frozen apple pie ranged in price from $3.24 to $3.38 per dozen, while the "Frost 'N' Flame" frozen apple pie ranged in price from $2.75 to $3.10 per dozen.

Except during the periods or months hereinafter noted in this paragraph, the prices at which the "Swiss Miss" frozen pies were sold were always higher than the prices at which the larger and heavier "Frost 'N' Flame" frozen pies were sold in the Salt Lake City market area; and even in such periods or months the prices of "Swiss Miss" frozen pies were higher than the prices of "Frost 'N' Flame" frozen pies on an ounce-for-ounce basis; and professional buyers for resale always take into con-

sideration differences in size and weight. In the period September 1960 through November 1961, the price of the "Swiss Miss" frozen cherry pie, if difference in weight be disregarded, was lower than the price of "Frost 'N' Flame" frozen cherry pie in such market area. That was true of "Swiss Miss" frozen peach pie in August and October 1960, and January, February, March, June, and September, 1961, and of "Swiss Miss" frozen boysenberry pie from August 1960, through December 1961. It was never true of "Swiss Miss" frozen apple pie.

Utah Pie's Exhibit 112 reflects the price lists and special deals offered by Pet in Wyoming, Washington, Utah, Oregon, Montana, Idaho, Colorado, southern California, and northern California in 1958, 1959, 1960, and 1961. A chart annexed to our former opinion as Appendix II (see 349 F.2d 159, 160) analyzes month by month the lowest absolute price offered by Pet for apple pie in each of such market areas. By lowest absolute price is meant the list price, less any deals offered, whether direct discounts from the invoice price or advertising allowances. Apple pie figures are used, because it is the volume leader, sells at the lowest price of the frozen pies, and is the price indicator. That chart shows the following:

Pet's absolute price for apple pie was uniform in Wyoming, Utah, Montana, Idaho, and Colorado from January 1958 through November 1959; at no time during that period was Pet's price in Utah lower than its prices in any of the other market areas; and during such period Pet's lowest price was always in northern California, southern California, Washington, or Oregon.

In December 1959, Pet's Utah price was $3.80 per dozen, while its price in Wyoming, Washington, Oregon, Montana, and Colorado was $4.00 per dozen, but in that same month Pet offered apple pie in northern California for $3.70 per dozen and in southern California for $3.60 per dozen.

During four months in 1960, Pet charged less for apple pie in Utah than it did in some of its other market areas, but at all times during 1960, Pet's Utah price was higher than its price in southern California and was the same or higher than its price in northern California.

In January and February 1961, Pet's lowest offering price for apple pie was $3.70 per dozen and was made in Utah, Montana, and Colorado; in March and April 1961, Pet's lowest offering price for apple pie was $3.56 per dozen and was made in Utah, Montana, and Idaho; and from May through August 1961, Pet's apple pie price in Utah was the same or higher than its apple pie prices in its other market areas.

Thus, in only nine months of the 44 months here involved, was Pet's price for apple pie lower in Utah than in any of its other market areas, and in only four months, January, February, March, and April, 1961, was Pet's price in Utah the lowest of any of its other market areas.

Furthermore, a comparison of Utah Pie's absolute apple pie prices, shown by its Exhibit 91, and set forth in a chart annexed to our former opinion as Appendix III (see 349 F.2d 160), and Pet's lowest absolute prices, reflected in Appendix II to our former opinion, shows that at no time during the 44-month period of May 1958

through December 1961 were Pet's Utah prices lower than Utah Pie's prices.

Pet introduced a machine tabulation of invoices of actual sales of frozen pies by it to its customers in seven cities in the western states, during the period from May 1958 through December 1961. The seven cities were selected because most of Pet's frozen pies sold in the western states are sold through wholesalers in those cities.

Pet's Exhibit A-40, introduced below, has particular relevancy to Utah Pie's allegation of territorial price differences, namely, that Pet charged lower prices for its frozen pies in the Salt Lake City market area than it charged in the market area in which its pies were made, or in other western market areas. It shows the lowest invoice prices at which "Pet-Ritz" frozen apple pies were sold in Salt Lake City and the six selected cities, and we reflect the pertinent part thereof in a chart annexed hereto as Appendix B.

During the period covered by the tabulation (44 months in all), the lowest price at which "Pet-Ritz" frozen apple pies were sold by Pet to wholesalers in Salt Lake City was lower than the lowest price at which such pies were sold by Pet to wholesalers in Los Angeles in only three months—December 1959, March 1961, and April 1961. The following table lists such prices, as well as the lowest price at which Utah Pie sold frozen apple pies under its "Utah" brand in Salt Lake City in the same months.

Lowest Price Charged for a Dozen Frozen Apple Pies

	Pet-Ritz		Utah Pie
	Los Angeles	Salt Lake City	Salt Lake City
December 1959	$3.90	$3.84	$3.60
March 1961	4.26	4.24	3.10
April 1961	4.26	4.08	3.50

During the same period, the lowest price at which "Pet-Ritz" frozen apple pies were sold by Pet to wholesalers in Salt Lake City was lower than the lowest price at which such pies were sold by Pet to wholesalers in San Francisco in only seven months—December 1959, August 1960, January 1961, February 1961, March 1961, and April 1961. The following table lists the lowest prices at which "Pet-Ritz" frozen pies were sold in each of the cities during those months, and the lowest price at which Utah Pie sold its 24-ounce "Utah" brand frozen apple pies in Salt Lake City during those months.

Lowest Price Charged for a Dozen Frozen Apple Pies

	Pet-Ritz		Utah Pie
	San Francisco	Salt Lake City	Salt Lake City
December 1959	$4.00	$3.84	$3.60
August 1960	4.40	4.28	3.50
September 1960	4.40	4.28	3.16
January 1961	4.40	4.28	3.43
February 1961	4.40	4.28	3.50
March 1961	4.40	4.24	3.10
April 1961	4.48	4.08	3.50

The number of "Pet-Ritz" frozen apple pies sold in the Salt Lake City market area at such lower prices is almost inconsequential. They were as follows:

December	1959	125.0 dozen	February	1961	27.5 dozen
August	1960	45.0 dozen	March	1961	27.5 dozen
September	1960	52.5 dozen	April	1961	25.0 dozen
January	1961	12.5 dozen		Total	315.0 dozen

The introduction of the economy "Swiss Miss" pie by Pet to enable it to better compete with lower priced pies

in various markets has been discussed earlier. One question with respect to that pie remains. Was it sold at lower prices in the Salt Lake City market area than in California, where the pies were manufactured? Utah Pie introduced no evidence whatsoever to sustain any burden of proving lower prices for "Swiss Miss" pies in the Salt Lake City market area. The "Swiss Miss" pie was first sold in Salt Lake City in August 1960. The present complaint was filed in September 1961. Exhibit A-40, introduced below, also shows all the actual sales of "Swiss Miss" pies in the seven western cities mentioned above in 1960 and 1961, and we reflected the pertinent part thereof in that respect in a chart annexed to our former opinion as Appendix V (see 349 F.2d 162). During only one of the intervening 13 months was the lowest price at which the "Swiss Miss" apple pie was sold in Salt Lake City lower than the price at which such pie was sold in San Francisco, and at no time was the price in Los Angeles higher than the lowest price in Salt Lake City. In addition, during this entire period, the price of the "Frost 'N' Flame" pie, manufactured by Utah Pie, was always lower than the price of the lighter (by four ounces) "Swiss Miss" pie. The following tabulation permits a comparison of the prices.

	Lowest Price Per Dozen—Apple Pies			
	Swiss Miss			Frost 'N' Flame
	Salt Lake City	Los Angeles	San Francisco	Salt Lake City
1960				
August	$3.29	$3.05	$3.29	$3.00
September	3.25	3.05	3.17	3.00
October	3.25	3.05	3.17	3.10
November	—*	3.05	3.05	3.10
December	—	3.05	3.29	3.10

*—indicates no sales were made in the month.

1961				
January	3.29	3.05	——	3.10
February	3.25	3.05	——	3.10
March	3.25	3.05	——	3.10
April	3.25	3.05	——	3.10
May	3.25	3.05	3.29	3.10
June	3.25	3.05	3.21	2.75
July	3.29	3.05	3.29	2.75
August	——	——	3.17	2.75

Even when Utah Pie's prices for "Frost 'N' Flame" were down to $2.75 per dozen in July and August 1961, it made a profit on its sales thereof.

In 1958, Utah Pie sold 37,969.5 dozen frozen pies in the Salt Lake City market area, which was 66.5 per cent of the total sales volume. In 1958, Pet sold 9,336.5 dozen frozen pies in that market area, which was 16.4 per cent of the total sales volume. In 1958, neither Utah Pie nor Pet sold any "Bel-air" pies to Safeway.

In 1959, Utah Pie sold 38,372 dozen frozen pies in that market area, which was 34.3 per cent of the total sales volume. In 1959, Pet sold 39,639 dozen frozen pies in that market area, which was 35.5 per cent of the total sales volume. However, in 1959, in that market area Utah Pie sold no "Bel-air" frozen fruit pies to Safeway, and Pet sold in that year 25,462.5 dozen "Bel-air" frozen fruit pies to Safeway. Pet's market share, or percentage of total sales volume in that year, with frozen fruit pies sold to Safeway excluded, was 12.7 per cent.

In 1960, Utah Pie sold 83,894 dozen frozen pies in that market area, which was 45.5 per cent of the total sales volume. In 1960, Pet sold 51,480 dozen frozen pies in that market area, which was 27.9 per cent of the total

sales volume. However, in 1960, in that market area, Utah Pie sold no "Bel-air" frozen pies to Safeway, while Pet sold 22,694 dozen "Bel-air" frozen fruit pies to Safeway, and Pet's market share, or percentage of the total sales volume, with the frozen fruit pies it sold to Safeway excluded, was 15.6 per cent.

In 1961, Utah Pie sold 102,690 dozen frozen pies in that market area, which was 45.3 per cent of the total sales volume. In 1961, Pet sold 66,786 dozen frozen pies in that market area, which was 29.4 per cent of the total sales volume. However, in 1961 in that market area Utah Pie sold no "Bel-air" frozen fruit pies to Safeway, while in that year Pet sold Safeway 14,897.5 dozen frozen fruit pies, and Pet's market share or percentage of total sales volume, with the frozen fruit pies sold by it to Safeway excluded, was 22.9 per cent.

Pet's market share, exclusive of "Bel-air" frozen fruit pies sold to Safeway, increased 7.3 per cent in 1961 over 1960, but uncontroverted facts show that gain did not result from a loss by Utah Pie. In 1960, Utah Pie sold 4,608.5 dozen "Bel-air" mince pies to Safeway. Due to its unwillingness to use the new type carton Safeway requested, it sold Safeway only 50 dozen mince pies in 1961. It is apparent that no problem with respect to new cartons existed as to pumpkin pies, because Utah Pie sold Safeway 1,146.5 dozen more pumpkin pies in 1961 than it did in 1960. The only reasonable inference is that had Utah Pie been willing to adopt the new carton for mince pies, it would have sold Safeway at least as many mince pies in 1961 as it did in 1960, and had it done so its market share in 1961 would have been

46.8 per cent, instead of 45.3 per cent. In 1960, Pet's "Swiss Miss" sales accounted for 11.1 per cent of the total sales in the Salt Lake City market area, while its "Pet-Ritz" sales accounted for only 4.5 per cent thereof. In 1961, Pet's "Swiss Miss" sales accounted for 21.2 per cent of the total sales in such market area, while its "Pet-Ritz" sales accounted for only 1.7 per cent thereof. Pet's increase in market share in 1961 was due solely to the increase in its sales of "Swiss Miss" pies, and that pie, on an ounce-for-ounce basis, was always sold at a higher price than Utah Pie's "Frost 'N' Flame" pie. In only one month, May 1961, was "Swiss Miss" sold at a higher price in San Francisco than in Salt Lake City.

Moreover, the market share percentage of sellers in the Salt Lake City market area, other than Utah Pie and the defendants, decreased 4.5 per cent and their sales volume decreased 4,902 dozen in 1961; and it is reasonable to infer that Pet's market share increase in 1961 derived from such decreases suffered by such other sellers. And in view of the fact that Utah Pie had a substantial sales volume increase in 1961 and would have had a market share percentage increase in that year, had its sales of "Bel-air" frozen mince pies not substantially decreased, due to its refusal to adopt a new carton, it would be unreasonable to infer that Pet's gain resulted from any sales loss by Utah Pie.

The total sales volume in dozens and the percentage of market share of Utah Pie and Pet in the Salt Lake City market area, with the "Bel-air" sales by Pet excluded, in the years 1958 to 1961, inclusive, were as follows:

	Volume of Sales		Market Share	
	Pet	Utah Pie	Pet	Utah Pie
1958	9,336.5	37,969.5	16.4	66.5
1959	14,176.5	38,372	12.7	34.3
1960	28,786	83,894	15.6	45.5
1961	51,888.5	102,690	22.9	45.3

In 1962, Utah Pie's volume increased to 129,658.3. Pet's volume and its and Utah Pie's market share percentages are not shown in the record.

Even if "Bel-air" sales by Pet be included in its volume, Utah Pie greatly outdistanced Pet in 1960 and 1961.

We have shown that the jury's verdict against Pet was based on parts (A) and (G) of Exhibit 95 and the exhibits from which it was derived; that at the beginning of 1960, Associated Grocers, the largest purchaser of frozen pies and Utah Pie's largest customer in the Salt Lake City market area, which theretofore had purchased large quantities of Utah Pie's "Utah" brand of frozen pies, virtually discontinued handling and advertising "Utah" brand frozen pies and thereafter, through 1960 and 1961, purchased almost exclusively Utah Pie's controlled brand "Frost 'N' Flame" frozen pies in increasingly large quantities; and that the accountant who prepared such exhibits in making his computations wholly disregarded the sales of "Frost 'N' Flame" frozen pies by Utah Pie to Associated Grocers. It is obvious from those facts and other facts hereinbefore set out that parts (A) and (G) of Exhibit 95 and the exhibits on which such parts were based presented a clearly erroneous factual foundation for the computation of damages, and that their admission was plain and prejudicial error.

It follows that the judgment against Pet must be reversed and the cause remanded for a new trial on the § 2(a) claims against Pet.

IV

No. 7308—The Carnation Appeal

Carnation entered the frozen pie business in 1955 by acquiring a Los Angeles company then engaged in manufacturing and selling frozen pies in Utah and elsewhere under the "Simple Simon" brand. Carnation made substantial improvements in its predecessor's plant at Torrance, California (near Los Angeles), and radically altered its distribution system. At all times here material, Carnation marketed its "Simple Simon' pies in all western market areas, that is, Los Angeles, San Francisco, Portland, Boise, Seattle, Spokane, Phoenix, Salt Lake City, and Denver. Shortly after Carnation entered the field, the frozen pie business became highly competitive, marked by the introduction into the market areas of national brands, such as Pet's "Pet-Ritz," Continental's "Morton," and a number of other national brands. Also, in some of such market areas there were brands of regional manufacturers, such as "Mary Elizabeth," "County Fair," "Frigid Dough," "Chet's," and others, and also brands of local manufacturers, such as Utah Pie.

In order to meet the competitive activities of other manufacturers in the various market areas in which it sold its pies, Carnation developed a program of special temporary price reductions, varying from market area

to market area, and depending on local competitive conditions. These programs were called "deals" in the trade. In some areas they took the form of advertising allowances. However, in Utah such allowances were not permitted to be considered in computing "cost" under the Utah "cost plus six per cent" minimum markup law (13-5-7 Utah Code Anno. 1953). Carnation accordingly adopted "off invoice" deals in Utah and other market areas where similar statutes were in effect. Both types of deals had the same competitive purpose, namely, to induce the retailer to purchase and advertise Carnation pies and thereby meet the competitive tactics of other manufacturers having a like aim. All deals had common characteristics. They were of a temporary nature and they were offered to all purchasers alike in each market area.

Since deals were directed at local competitive conditions, they differed in duration, type, and amount in each market area, so that Carnation's net prices in each of the national market areas also frequently differed. At times during the period 1958 to 1961, inclusive, Carnation's prices in the Salt Lake City market area were higher than those charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions.

In addition to Utah Pie's lower price structure, other competitive conditions in the period 1958 to 1961 affected the market price and the market for "Simple Simon" pies in the Salt Lake City market area. In 1958, Safeway

introduced a private brand, "Bel-air," manufactured by Pet. Though of a similar grade and quality, it was sold at a lower price than the "Simple Simon" pie. In late 1959, Utah Pie introduced a controlled brand, "Frost 'N' Flame," for marketing through Associated Grocers, the largest group of cooperative buyers in that market area. In 1961, it introduced another controlled brand, "Mayfresh," for marketing through Grand Central American in that market area. The effect of a controlled brand, or label, is to tie the purchaser to a single supplier. Such was the effect here on Associated Grocers and Grand Central American.

"Frost 'N' Flame" and "Mayfresh" pies were of similar quality with "Simple Simon" and other brands sold in the Salt Lake City market area, but were introduced and sold at prices considerably below Carnation's prices for "Simple Simon" pies, as well as Utah Pie's own "Utah" brand. Utah Pie's "Utah" brand and it "Frost 'N' Flame" and "Mayfresh" brands were conceded to be identical pies with different labels.

Utah Pie's sales to Associated Grocers increased from 18,621 cases in 1959 to 77,894 cases in 1960, and 102,834 cases in 1961, while sales in the entire Salt Lake City market area only doubled in size between 1959 and 1961.

The three largest buyers of frozen pies in the Salt Lake City market area, whose advertising set the Salt Lake City market area prices, were Associated Grocers, Safeway, and Utah Wholesale Grocery. In 1961, Utah Pie sold to Associated Grocers nearly nine times as many pies as did Carnation, while in 1958, Utah Pie sold to Associated Grocers only three and one-half times

as many pies as did Carnation. By the end of 1961, Carnation was entirely out at Safeway, the year in which Utah Pie sold Safeway 36,202 dozen frozen pies, including 6,533 dozen "Bel-air" mince and pumpkin pies and 11,568 dozen pies under Utah Pie's own brand, "Utah." In 1958, Carnation sold four times as many pies as Utah Pie to Utah Wholesale Grocery, but in 1961, Utah Pie sold six and one-third times as many pies as did Carnation to Utah Wholesale Grocery. During the four-year period, Utah Pie's sales to the "big three" were over 240,000 dozen, while Carnation's were less than 30,000 dozen.

To make the comparison between Carnation and Utah Pie more graphic, we set forth in subjoined note[19] in parallel vertical columns the percentage of the market share in the Salt Lake City market area; and in like columns the volume of sales in dozens by Carnation and Utah Pie in each of the years 1958 to 1962, inclusive.

Frozen apple pie is the volume leader and price indicator. The frozen apple pie sales in the Salt Lake City

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[19] **Market Share**

1958	Carnation—10.3%	Utah Pie—66.5%
1959	Carnation— 8.6%	Utah Pie—34.3%
1960	Carnation—12.1%	Utah Pie—45.5%
1961	Carnation— 8.8%	Utah Pie—45.3%

Sales Volume

1958	Carnation— 5,863 doz.	Utah Pie— 37,969.5 doz.
1959	Carnation— 9,625 doz.	Utah Pie— 38,372 doz.
1960	Carnation—22,371.5 doz.	Utah Pie— 83,894 doz.
1961	Carnation—20,067 doz.	Utah Pie—102,690 doz.
1962	Carnation— 5,329.5 doz.*	Utah Pie—129,658.5 doz.**

*A lower level than any of the preceding five years.

**The record does not reflect total sales volume for 1962, hence percentage market share cannot be computed.

market area from 1957 to 1961, inclusive, of Utah Pie and Carnation, and of Carnation in 1962, were as follows:

	1957 (4 mo.)	1958	1959	1960	1961	1962
Utah Pie	893.5	10,312	13,285	27,225	46,791.5	
	1957 (12 mo.)	**1958**	**1959**	**1960**	**1961**	**1962**
Carnation	3,234.5	2,391	3,164	8,455.5	6,885.5	1,802.5

Another basis of comparison is retailer's advertising. In 1961, retailers advertised Utah Pie's brands 72 times and Carnation's only four times.

A chart annexed to our former opinion as Appendix VII (see 349 F.2d 164, 165) sets forth month by month in the first, second, third, and fifth columns of figures the lowest absolute prices at which Carnation offered its frozen apple pies to dealers in the San Francisco, Spokane, Denver, and Salt Lake City market areas, and in the fourth column the lowest absolute price at which Utah Pie sold its "Utah" brand frozen apple pies in the Salt Lake City market area. By "absolute price" we mean the list price, less any deals offered, whether direct discounts from invoices or allowances for advertising. This chart covered the period from January 1958 to August 1961.

An examination of such chart shows that Carnation's absolute price for apple pie was uniform in the Spokane, Denver, and Salt Lake City market areas from January 1958 through October 1959; that during that period Carnation's price in the Salt Lake City market area was always the same as or higher than its price in the fourth market area, San Francisco; and that during such time

the only variations in Carnation's prices were in the San Francisco market area, with such variations making the price in that market area lower than its price in the other market areas from time to time.

The chart further shows that in February 1960 Carnation's Salt Lake City market price was lower than its San Francisco market price, and in March, April, May, October, November, and December, 1960, its Salt Lake City market price was lower than its Spokane market price, but that at no time during 1960 was the Salt Lake City market price the lowest price offered by Carnation in the several market areas.

The chart further shows that from January 1961 to July 1961 Carnation's Salt Lake City market price was lower than its San Francisco and Spokane market prices, and that in August 1961 its Salt Lake City market price was lower than its Spokane and Denver market prices, but in 1961 Carnation's Salt Lake City market price was never the lowest price offered by Carnation in the several market areas.

The chart further shows that in only eight months of the 44 months here involved was Carnation's market price for its "Simple Simon" pie lower than Utah Pie's price for its "Utah" brand pie in the Salt Lake City market area, the months being October, November, and December 1958, July 1959, February and March 1960, and February and April 1961.

Utah Pie's price for its "Frost 'N' Flame" pie, from the time it was first introduced in August 1959 through 1961, was always lower than Carnation's price for its "Simple Simon" pie in the Salt Lake City market area.

A chart annexed to our former opinion as Appendix VIII (see 349 F.2d 165) sets forth Utah Pie's sale prices for its "Frost 'N' Flame" apple pie and Carnation's offering prices for its "Simple Simon" apple pie from August 1959 to August 1961, inclusive, in the Salt Lake City market area. It will be noted therefrom that the prices for the "Simple Simon" apple pie were always substantially higher than the prices for the "Frost 'N' Flame" apple pie during that period.

Appendices VII and VIII, annexed to our former opinion (see 349 F.2d 164, 165), show that Carnation's prices for its "Simple Simon" pie from August 1959 to August 1961, inclusive, were always higher in the four market areas covered in Appendix VII, of which the Salt Lake City market area is one, than Utah Pie's prices for its "Frost 'N' Flame" pie in the Salt Lake City market area in that period, except in Denver in October 1960, and January, February, March, April, and May, 1961.

Carnation's prices for other pies, through its deal offers in the Salt Lake City market area, were at times below and at times above Utah Pie's price for its "Utah" brand.

It should be noted that 1958, the year in which during the months of October, November, and December Carnation's price for its "Simple Simon" pie was lower than Utah Pie's price for its "Utah" brand in the Salt Lake City market area, was the year in which Utah Pie's market share of all the pies sold in such market area zoomed to 66.5 per cent. And further, that in 1959, when Utah Pie's market share fell to 34.3 per cent, Utah Pie's prices for its "Utah" brand, except in the month of July

of that year, were always lower than Carnation's prices for its "Simple Simon" pie in the Salt Lake City market area. And further, that in 1960, when Utah Pie's prices for its "Utah" brand were lower, except for two months, February and March, than Carnation's prices for its "Simple Simon" pie, and when Carnation's prices were always higher than Utah Pie's prices for its "Frost 'N' Flame" pie in the Salt Lake City market area, Utah Pie's market share increased 11.2 per cent over the previous year and its volume more than doubled, being a 45,522 dozen increase over the previous year, while Carnation's market share increased only 3.5 per cent and its volume only 12,746.5 dozen. And finally, that in 1961, when Utah Pie's prices for its "Utah" brand were lower, except in two months, February and April, than Carnation's prices for its "Simple Simon" pie, and when Carnation's prices were always higher than Utah Pie's for its "Frost 'N' Flame" pie in the Salt Lake City market area, Utah Pie's market share decreased two tenths of one per cent and its volume increased 18,796 dozen over the previous year, and Carnation's market share decreased 3.3 per cent and its volume decreased 2,304.5 dozen from the previous year.

The market shares, respectively, of Utah Pie, Carnation, and all the other sellers in the Salt Lake City market area in the years 1958 to 1961, inclusive, were as follows:

	1958	1959	1960	1961
Utah Pie	66.5%	34.3%	45.5%	45.3%
Carnation	10.3%	8.6%	12.1%	8.8%
All other sellers	23.2%	57.1%	42.4%	45.9%

What Utah Pie lost in 1959 went not to Carnation, but to other sellers in that market area, as did Carnation's market share loss in that year.

The market share of both Carnation and Utah Pie increased in 1960, but it is clear that those gains resulted from loss of market share by sellers other than Utah Pie and Carnation. In 1961, Carnation's share dropped back to approximately where it was in 1959, Utah Pie remained at approximately its 1960 percentage share, and other sellers gained slightly more than Carnation lost.

Carnation's reduction of prices in the Salt Lake City market area was made in an effort that was far from successful to compete with the prices at which Utah Pie offered and sold its pies. Clearly, Carnation was never able to compete with Utah Pie's "Frost 'N' Flame" pie price, and only part of the time with the price at which Utah Pie priced and sold its "Utah" brand pies.

However, in view of the Supreme Court's decision in these cases, we must assume that under the evidence the jury was warranted in finding that Carnation had violated § 2(a). That being so, we do not think it can be said as a matter of law that Utah Pie suffered no damages proximately caused by such violations.

We have shown that the jury's verdict against Carnation was based on parts (A) and (G) of Exhibit 95 and the exhibits from which it was derived. For substantially the same reasons we stated, supra, that such parts (A) and (G) of Exhibit 95 and the exhibits upon which they were based presented a clearly erroneous foundation for

the computation of damages against Pet, we also conclude they presented a clearly erroneous foundation for the computation of damages against Carnation, and that their admission against Carnation was plain and prejudicial error. It follows that the judgment against Carnation must be reversed and the case remanded for a new trial on the § 2(a) claims against Carnation.

The consolidated judgment and the injunctive decree are severally reversed and the case is remanded, with instructions to grant new trials to Continental, Pet, and Carnation, and Utah Pie a new trial on Continental's counterclaim, and proceed further in accordance with the views expressed in the opinion of the Supreme Court and in this opinion.

Filed May 7, 1968,
William L. Whittaker, Clerk.

APPENDIX A

MARKET SHARES OF 8" FROZEN FRUIT PIE-INTERMOUNTAIN MARKET-1958

Number of Dozens by Flavor

Brand	Apple	Cherry	Peach	Boysen-berry	Mince	Pumpkin	Other Fruit	All Flavors
1 Carnation	2391.0	1353.5	105.5	856.5	340.0	425.0	391.5	5863.0
2 Mortons	249.0	83.5	25.5	63.5	127.5	201.0	4.0	754.0
3 Utah Pie	10312.0	9513.5	--	8792.0	2666.0	6675.0	11.0	37969.5
6 BelAir-Utah Pie	--	--	--	--	--	--	--	--
Total 3+6	10312.0	9513.5	--	8792.0	2666.0	6675.0	11.0	37969.5
4 Frost N' Flame	--	--	--	--	--	--	--	--
5 Mayfresh	--	--	--	--	--	--		--
Total Utah Pie	10312.0	9513.5	--	8792.0	2666.0	6675.0		37969.5
8 Swiss Miss	--	--	--	--	--	--		--
7 Pet Ritz	3369.0	2676.5	781.0	1041.0	598.5	779.0	5	16.5
6 BelAir-Pet Milk	--	--	--	--	--	--		--
Total 7+6	3369.0	2676.5	781.0	1041.0	598.5	779.0	5	9336.5
Total Pet Milk	3369.0	2676.5	781.0	1041.0	598.5	779.0	191.5	9336.5
Total Other	1427.0	1326.0	105.5	130.5	31.0	2.0	25.0	3137.0
Total All Brands	17648.0	14953.0	1107.5	10883.5	3769.0	8082.0	623.0	57030.0

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the computation of damages against Pet, we also conclude they presented a clearly erroneous foundation for the computation of damages against Carnation, and that their adoption was error. Carnation was plain and prejudicial error. It follows that the judgment against Carnation must be reversed and a new trial granted.

We concluded the same in reviewing the order granting Utah Pie's motion for a new trial. The order must be reversed and the case remanded with instructions to grant a new trial as to Carnation, and Utah Pie's motion for a new trial as to the complaint against Carnation, and proceed further consistent with the opinion of the Ninth Circuit herein. We therefore reverse the order of the District Court.

Filed May 7, 1963.
William A. Wharton
Clerk

APPENDIX A

MARKET SHARES OF 8" FROZEN PIE-INTERMOUNTAIN MARKET-1959

Number of Dozens by Flavor

Brand	Apple	Cherry	Peach	Boysen-berry	Mince	Pump-kin	Other Fruit	All Flavors
1 Carnation	3164.0	2147.5	852.0	905.5	1064.0	1198.0	204.0	9825.0
2 Mortons	1907.5	1269.5	2.0	1.5	--	--	1.5	3182.0
3 Utah Pie	13264.0	7445.0	--	7548.5	3002.0	6570.0	508.5	38338.0
6 BelAir-Utah Pie	--	--	--	--	--	--	--	--
Total 3+6	13264.0	7445.0	--	7548.5	3002.0	6570.0	508.5	38338.0
4 Frost N' Flame	21.0	--	--	--	--	13.0	--	34.0
5 Mayfresh	--	--	--	--	--	--	--	--
Total Utah Pie	13285.0	7445.0	--	7548.5	3002.0	6583.0	508.5	38372.0
8 Swiss Miss	--	--	--	--	--	--	--	--
7 Pet Ritz	4933.0	3579.0	1481.5	1472.0	907.0	1146.0	658.0	14176.5
6 BelAir-Pet Milk	9725.0	7425.0	4362.5	3950.0	--	--	--	25462.5
Total 7+6	14658.0	11004.0	5844.0	5422.0	907.0	1146.0	658.0	39639.0
Total Pet Milk	14658.0	11004.0	5844.0	5422.0	907.0	1146.0	658.0	39639.0
Total Other	8007.0	3036.5	1141.5	2822.0	2507.5	3358.5	38.0	20911.0
Total All Brands	41021.5	24902.5	7839.5	16789.5	7480.5	12283.5	1410.0	111729.0

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APPENDIX A

[illegible] BIRDS OF [illegible] PIG-[illegible]MOUNTAIN MARKET-1938

Number of Persons by Places

Breed	Apple	Cherry	Peach	Quarantine	Melon	Pumpkin	Other Fruit	All Places
1 Cornation	3164.0	2147.5	840.0	1082.5	1964.0	1758.0	320.0	9127.0
2 Sweeps	1067.5	1290.5	2.0	1.5	--	--	1.5	3164.0
3 Elk Pig	13264.0	7443.0	--	7546.5	3002.0	6370.0	306.5	38332.0
8 Peanut-Elk Pig	--	--	--	--	--	--	--	--
Total Pig	13264.0	7443.0	--	7546.5	3002.0	6370.0	306.5	38332.0
4 Piggy Bi Pigmo	47.0	--	--	--	--	37.0	--	84.0
5 Sweeps	--	--	--	--	--	--	--	--
Total Dark Pig	13268.0	7443.0	--	7546.5	3002.0	6407.0	306.5	38416.0
6 Swine Hogs	--	--	--	--	--	--	--	--
7 Pig pigs	4023.0	3177.0	1481.5	3079.0	907.0	1140.0	818.0	14625.5
8 Guinea-Pig Hogs	6743.0	7423.0	4082.5	3950.0	--	--	--	26198.5
Total Pig-	14658.0	11004.0	5564.0	5422.0	907.0	1140.0	818.0	39823.5
Total Pig Hogs	14658.0	11004.0	5564.0	5422.0	907.0	1140.0	818.0	39823.5
Total Other	7067.0	3046.5	1243.5	2822.0	2507.5	2378.5	38.0	20913.0
Total All Breeds	45021.0	26900.5	7250.5	16750.5	7416.5	12255.5	1410.0	117755.0

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APPENDIX A

MARKET SHARES 8" FROZEN FRUIT PIE-INTERMOUNTAIN MARKET-1960

Number of Dozens by Flavor

Brand	Apple	Cherry	Peach	Boysen-berry	Mince	Pump-kin	Other	All Flavors
1 Carnation	8455.5	6788.0	2983.5	1586.5	962.5	1199.0	396.5	22371.5
2 Mortons*	1950.0	100.0	--	--	525.0	775.0	--	3350.0
3 Utah Pie	12144.0	8595.5	592.5	7604.0	3404.0	4181.5	238.0	36759.5
6 BelAir-Utah Pie	--	--	--	--	4608.5	5336.5	--	9945.0
Total 3+6	12144.0	8595.5	592.5	7604.0	8012.5	9518.0	238.0	46704.5
4 Frost N' Flame	15081.0	5753.5	546.5	5569.0	3765.5	6474.0	--	37189.5
5 Mayfresh	--	--	--	--	--	--	--	--
Total Utah Pie	27225.0	14349.0	1139.0	13173.0	11778.0	15992.0	238.0	83894.0
8 Swiss Miss	6377.0	5645.0	2988.5	5005.5	184.5	372.5	--	20573.0
7 Pet Ritz	3105.0	2344.0	1208.0	612.5	135.0	220.0	588.5	8213.0
6 BelAir-Pet Milk	14015.0	4927.5	1602.5	2149.0	--	--	--	22694.0
Total 7+6	17120.0	7271.5	2810.5	2761.5	135.0	220.0	588.5	30907.0
Total Pet Milk	23497.0	12916.5	5799.0	7767.0	319.5	592.5	588.5	51480.0
Total Other	8568.0	5829.5	1638.0	4734.0	698.0	1705.0	303.0	23473.5
Total All Brands	70293.5	39983.0	11559.5	27260.5	14283.0	20263.5	1526.0	183043.0

Corrected 2-2-63 on basis of additional sales to A. G. (Pocatello), Idaho Creameries, Idaho Falls, and Cannery Sales, Salt Lake City, reported by Continental this date.

APPENDIX A

MARKET SHARES OF MODERN FRUIT PIE-INTERMOUNTAIN MARKET-1960

Number of Dozens by Flavor

	Apple	Cherry	Peach	Boysen-berry	Mince	Pump-kin	Other	All Flavors
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	--	--	[illegible]	[illegible]	--	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	--	--	--	--	--	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	--	[illegible]
[illegible]	--	--	--	--	--	--	--	--
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	--	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	--	--	--	--	--	--	--	--
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[illegible] 2-2-62, on basis of additional sales to A. G. (Pocatello), Idaho Falls, Idaho Falls, Ida Dairy Sales, Salt Lake City, reported by [illegible] dairy date.

Pl.'s Ex. 62
page 4

APPENDIX A

MARKET SHARES 8" FROZEN FRUIT PIE-INTERMOUNTAIN MARKET-1961

Number of Dozens by Flavor

Brand	Apple	Cherry	Peach	Boysen-berry	Mince	Pump-kin	Other Fruit	All Flavors
1 Carnation	6885.5	5355.5	1821.0	2411.0	716.5	942.0	1935.5	20067.0
2 Mortons	14699.5	1337.5	12.5	1287.5	250.0	1212.5	---	18799.5
3 Utah Pie	20403.0	7392.5	1644.0	6378.5	6902.5	3145.5	150.0	46016.0
6 BelAir-Utah Pie	---	---	---	---	50.0	6483.0	---	6533.0
Total 3+6	20403.0	7392.5	1644.0	6378.5	6952.5	9628.5	150.0	52549.0
4 Frost N' Flame	25930.5	6710.0	2023.0	3663.5	3583.0	5053.5	---	48963.5
5 Mayfresh	458.0	347.5	50.0	322.0	---	---	---	1177.5
Total Utah Pie	46791.5	14450.0	3717.0	12364.0	10535.5	14682.0	150.0	102690.0
8 Swiss Miss	16272.0	1338.0	2310.0	14748.0	505.0	860.0	22.0	48104.0
7 Pet Ritz	1497.0	79.[illegible]	325.0	552.5	12.5	15.0	590.0	3784.5
6 BelAir-Pet Milk	8732.5	4115.	500.0	550.0	1000.0	---	---	14897.5
Total 7+6	10229.5	4907.5	825.0	1102.5	1012.5	15.0	590.0	18682.0
Total Pet Milk	26501.5	18294.5	3135.0	15850.5	1517.5	875.0	612.0	66786.0
Total Other	5024.0	3500.5	1053.0	3250.0	1946.0	3344.5	447.5	18565.5
Total All Brands	99902.0	42938.0	9738.5	35163.0	14965.5	21056.0	3145.0	226903.0

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APPENDIX A

...ARKET SHARES BY PROGRAM ENTITY FOR INTERNATIONAL MARKET-1982

Number of Returns by Flavor

Brand	Apple	Cherry	Peach	Peppermint	Mango	Pineapple	Other Fruit	All Flavors
1 Cinnamint	6852.5	2855.5	1821.0	2411.0	794.5	642.0	1535.5	20017.0
2 Wintons	3486.5	1327.5	12.5	1287.5	210.0	1212.5	--	18750.5
3 Utah Pie	20603.0	7392.5	1844.0	6372.5	6402.5	3142.5	150.0	46019.0
4 Salt Lake Pie	--	--	--	--	20.0	6483.0	--	6513.0
Total Utah	20603.0	7392.5	16.0	6372.5	6952.5	6528.5	150.0	52549.0
5 Great W. Pies	29530.5	6710.0	2023.0	5063.5	3583.0	3023.5	--	49963.5
6 Mard Pub	456.0	343.5	50.0	322.0	--	--	--	1177.5
Total Utah Pie	66763.5	14430.0	3917.0	12364.0	10535.5	14682.0	150.0	102860.0
8 Swiss Miss	39272.0	13287.0	2310.0	14748.0	503.0	860.0	22.0	41802.0
7 Pet Milk	1407.0	704.4	325.0	582.5	13.5	12.0	180.0	3726.5
6 Delair-Pet Milk	8732.5	4113	540.0	330.0	1000.0	--	--	14607.5
Total Pet	10229.5	4907.5	865.0	1102.5	1012.5	12.0	180.0	18682.0
Total Pet Milk	20301.5	18204.5	3175.0	13490.5	13147.5	872.0	612.0	60788.0
Total Others	3024.0	2500.5	1053.0	3210.0	1046.0	3944.5	447.5	18585.5
Total All Brands	90002.0	45238.0	8736.5	33183.0	24685.5	21016.0	3145.0	225805.0

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Pl.'s Ex. 84

APPENDIX A

UTAH PIE COMPANY

Estimated Dozens Lost to Defendants

Years 1958, 1960 & 8-month Period Ended 8/31/61

	Dozens Lost	Total
Morton		
Denver Sales		
1959	52,000	
1960	74,500	
1961 (To 8/31/61)	105,000	231,500
Pet		
Salt Lake Div. - Bel Air		
1959	25,462	
1960	22,694	
1961 (To 8/31/61)	9,932	58,088
Denver - Bel Air		
1959	40,000	
1960	30,000	
1961 (To 8/31/61)	20,000	90,000
All Defendants		
Intermountain Area per Ex. 62		
1959	9,411	
1960	34,218	
1961 (To 8/31/61)	34,350	77,979
Seattle, Spokane, Portland Area		
1959	5,000	
1960	8,000	
1961 (To 8/31/61)	10,000	23,000
	Total Dozens	480,567

Pl.'s Ex. 94

APPENDIX A

UTAH PIE COMPANY

Estimated Dozens Lost to Defendants

Years 1958, 1960 & 8-month Period Ended 8/31/61

	Dozens Lost	Total
Morton		
Denver Sales		
1959	52,000	
1960	74,500	
1961 (To 8/31/61)	105,000	231,500
Pet		
Salt Lake Div. - Bel Air		
1959	25,462	
1960	22,694	
1961 (To 8/31/61)	9,932	58,088
Denver - Bel Air		
1959	40,000	
1960	30,000	
1961 (To 8/31/61)	20,000	90,000
All Defendants		
Intermountain Area per Ex. 62		
1959	9,411	
1960	34,248	
1961 (To 8/31/61)	34,350	77,979
Seattle, Spokane, Portland Area		
1959	5,000	
1960	8,000	
1961 (To 8/31/61)	10,000	23,000
	Total Dozens	480,567

APPENDIX A

DOZENS OF FROZEN FRUIT PIES SOLD BY DEFENDANTS AND PLAINTIFF IN THE INTERMOUNTAIN MARKET FOR THE YEARS 1958, 1959, 1960 AND 1961 (OTHER THAN PRIVATE LABEL BRANDS)*

Company and Brand	1958 (Dozens)	Percent to Total	1959 (Dozens)	Percent to Total	1960 (Dozens)	Percent to Total	1961 (Dozens)	Percent to Total
Carnation Company (Simple Simon)	5,863.0	10.87%	9,625.0	14.74%	22,371.5	24.51%	20,067.0	14.67%
Continental Baking Company (Morton)	754.0	1.40%	3,182.0	4.87%	3,360.0	3.67%	18,799.5	13.75%
Pet Milk Company (Pet-Rite and Swiss Miss)	9,336.5	17.32%	14,176.5	21.70%	28,786.0	31.54%	51,888.5	37.94%
Utah Pie Company (Utah)	37,969.5	70.41%	38,338.0	58.69%	36,739.5	40.28%	46,016.0	33.64%
Totals	53,923.0	100.00%	65,321.5	100.00%	91,267.0	100.00%	136,771.0	100.00%

PERCENTAGE CHANGE USING 1958 AS BASE YEAR

Year	Carnation Company	Continental Baking Company	Pet Milk Company	Utah Pie Company
1958 (Base Year)	10.87%	1.40%	17.32%	70.41%
1959 Increase (Decrease)	3.87%	3.47%	4.38%	(11.72%)
1960 Increase (Decrease)	13.64%	2.27%	14.22%	(30.13%)
1961 Increase (Decrease)	3.80%	12.35%	20.62%	(36.77%)

* Based on Market Shares and Price Trend Study on 8" Frozen Fruit Pies in the "Intermountain Market" prepared by Dr. Anderson and Dr. Lamberg for defendants.

APPENDIX A

COMPUTATION OF ADDITIONAL DOZENS UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET POSITION IN RELATION TO DEFENDANTS WERE MAINTAINED FOR YEARS 1959, 1960 AND 1961

	1959	1960	Jan.1,1961 to Aug.31,1961
(1) Percent of total sales in Intermountain Market by defendants and plaintiffs (other than private label)	58.69%	40.28%	33.64%
(2) Actual dozens of Utah Brand sold by Utah Pie Company per IBM run	47,127.0	45,744.5	31,425.5
(3) Actual dozens divided by Percentage in (1) above to obtain 100%	80,298.0	113,566	93,417.0
(4) 1958 base year percentage for Utah Pie Company	70.41%	70.41%	70.41%
(5) Total dozens Utah Pie Company would have sold if 1958 market position in relation to defendants were maintained	56,538	79,962	65,775
(6) Additional dozens Utah Pie Company would have sold if 1958 market position in relation to defendants were maintained	9,411	34,218	34,350

SUMMARY OF ADDITIONAL DOZENS IN (6) BY DEFENDANT BASED UPON THE PERCENTAGE CHANGE OF EACH IN RELATION TO PLAINTIFF

	1959	1960	1961 period	Totals
Carnation Company	3,108	15,490	3,549	22,147
Continental Baking Company	2,787	2,578	11,538	16,903
Pet Milk Company	3,516	16,150	19,263	38,929
Total as Above	9,411	34,218	34,350	77,979

APPENDIX A

UTAH PIE COMPANY
COMPUTATION OF ESTIMATED GROSS PROFIT ON ADDITIONAL DOZENS UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET POSITION IN RELATION TO DEFENDANTS HAD BEEN MAINTAINED

	1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
Continental Baking Company				
Additional Dozens	2,787	2,578	11,538	16,903
Sales Price:				
Based on per dozen prices of:				
$4.30	$11,984	$11,085	$49,613	$72,682
$4.10	11,427	10,570	47,306	69,303
$3.90	10,869	10,054	44,998	65,921
$3.70	10,312	9,539	42,691	62,542
Cost of Sales*	7,804	7,322	32,422	47,548
Gross Profit:				
Based on per dozen sales price of:				
$4.30	$4,180	$3,763	$17,191	$25,134
$4.10	3,623	3,248	14,884	21,755
$3.90	3,065	2,732	12,576	18,373
$3.70	2,508	2,217	10,269	14,994

* Based on Utah Pie Company's 1960 price determination and weighted for flavor mix in each year.

APPENDIX A

APPENDIX A

UTAH PIE COMPANY
COMPUTATION OF ESTIMATED GROSS PROFIT ON ADDITIONAL DOZENS UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET POSITION IN RELATION TO DEFENDANTS HAD BEEN MAINTAINED

		1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
Carnation Company					
Additional Dozens		3,108	15,490	3,549	22,147
Sales Price:					
Based on per dozen price of:					
	$4.30	$13,364	$66,607	$15,261	$95,232
	$4.10	12,743	63,509	14,551	90,803
	$3.90	12,121	60,411	13,841	86,373
	$3.70	11,500	57,313	13,131	81,944
Cost of Sales*		8,702	43,992	9,973	62,667
Gross Profit:					
Based on per dozen sales price of:					
	$4.30	$ 4,662	$22,615	$ 5,288	$32,565
	$4.10	4,041	19,517	4,578	28,136
	$3.90	3,419	16,419	3,868	23,706
	$3.70	2,798	13,321	3,158	19,277

* Based on Utah Pie Company's 1960 price determination and weighted for flavor mix in each year.

APPENDIX A

UTAH PIE COMPANY

COMPUTATION OF ESTIMATED GROSS PROFIT ON ADDITIONAL DOZENS
UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET
POSITION [illegible] TO DEFENDANTS HAD BEEN MAINTAINED

	1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
rnation Company				
Additional Dozens	3,108	15,490	3,569	22,147
Sales Price:				
Based on per dozen price of:				
$4.30	$13,364	$66,607	$15,261	$95,232
$4.10	12,743	63,509	14,551	90,803
$3.90	12,121	60,411	13,841	86,373
$3.70	11,500	57,313	13,131	81,944
Cost of Sales	8,702	43,992	9,973	62,667
Gross Profit:				
Based on per dozen sales price of:				
$4.30	$ 4,662	$22,615	$ 5,288	$32,565
$4.10	4,041	19,517	4,578	28,136
$3.90	3,419	16,419	3,868	23,706
$3.70	2,798	13,321	3,158	19,277

ased on Utah Pie Company's 1960 price determination
nd weighted for flavor mix in each year.

APPENDIX A

UTAH PIE COMPANY
COMPUTATION OF ESTIMATED GROSS PROFIT ON ADDITIONAL DOZENS UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET POSITION IN RELATION TO DEFENDANTS HAD BEEN MAINTAINED

	1959	1960	Jan.1,1961 to August 31, 1961	Totals
Pet Milk Company				
Additional Dozens	3,516	16,150	19,263	38,929
Sales Price:				
Based on per dozen price of:				
$4.30	$15,119	$69,445	$82,831	$167,395
$4.10	14,416	66,215	78,978	159,609
$3.90	13,712	62,985	75,126	151,823
$3.70	13,009	59,755	71,273	144,037
Cost of Sales*	9,845	45,866	54,129	109,840
Gross Profit:				
Based on per dozen sales price of:				
$4.30	$ 5,274	$23,579	$28,702	$57,555
$4.10	4,571	20,349	24,849	49,769
$3.90	3,867	17,119	20,997	41,983
$3.70	3,164	13,889	17,144	34,197

* Based on Utah Pie Company's 1960 price determination and weighted for flavor mix in each year.

APPENDIX A

UTAH PIE COMPANY
COMPUTATION OF ESTIMATED GROSS PROFIT ON ADDITIONAL DOZENS
UTAH PIE COMPANY WOULD HAVE SOLD IF 1958 MARKET
POSITION IN RELATION TO DEFENDANTS HAD BEEN MAINTAINED

	1959	1960	Jan. 1 1961 to August 31, 1961	Totals
Per Milk Company				
Additional Dozens	3,516	26,130	19,296	38,929
Sales Price:				
Based on per dozen price of:				
$4.30	$15,119	$69,445	$82,831	$167,395
$4.10	14,416	66,215	78,976	159,609
$3.90	13,712	62,985	75,126	151,823
$3.70	13,009	59,755	71,273	144,037
Cost of Sales*	9,845	45,866	54,139	109,846
Gross Profit:				
Based on per dozen sales price of:				
$4.30	$ 5,274	$23,579	$26,702	$57,555
$4.10	4,571	20,349	24,849	49,769
$3.90	3,867	17,119	20,997	41,983
$3.70	3,164	13,889	17,144	34,197

* Based on Utah Pie Company's 1960 price determination and weighted for flavor mix in each year.

APPENDIX A

COMPUTATION OF ESTIMATED GROSS PROFIT UTAH PIE COMPANY WOULD HAVE REALIZED IF AN ADDITIONAL 23,000 DOZEN FROZEN FRUIT PIES HAD BEEN SOLD IN THE SEATTLE, SPOKANE AND PORTLAND AREAS

		1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
Additional Dozens		5,000	8,000	10,000	23,000
Sales Price:					
Based on per dozen prices of:					
	$4.30	$21,500	$34,400	$43,000	$98,900
	$4.10	20,500	32,800	41,000	94,300
	$3.90	19,500	31,200	39,000	89,700
	$3.70	18,500	29,600	37,000	85,100
Cost of Sales*		15,500	25,120	31,100	71,720
Gross Profit:					
Based on per dozen sales price of:					
	$4.30	$ 6,000	$9,280	$11,900	$27,180
	$4.10	5,000	7,680	9,900	22,580
	$3.90	4,000	6,080	7,900	17,980
	$3.70	3,000	4,480	5,900	13,380

DISTRIBUTION TO DEFENDANTS

(40%) Carnation Company	(40%) Continental Baking Company	(20%) Pet Milk Company
$10,872	$10,872	$ 5,436
9,032	9,032	4,516
7,192	7,192	3,596
5,352	5,352	2,676

* 30¢ per dozen freight added to costs of manufacturing.

APPENDIX A

DESCRIPTION OF AUTOMATED-CROSS FACILITY WITHIN THE COMPANY
WORLD NEWS MAGAZINE - AN ANNUAL CIRCULATION OF 32,000 PERSONS
PRESENT TRAFFIC FLOWS HAS BEEN GOING UP SINCE 1ST JUNE
SERVICES, BUILDING AND FOOTBALL AREAS

Jan.1,1981
to Aug.31,

	1979	1980	1981	Total
Additional Income	3,000	6,000	10,000	19,000
Sales Volume				
Based on per dozen option out:				
	24.30	817,300	834,400	845,000	513,900
	24.10	20,300	32,800	41,000	54,300
	23.90	12,300	21,200	29,000	29,700
	23.70	18,700	25,800	32,000	43,100
Cost of Sales		15,300	25,100	31,300	71,740
Gross Profit					
Based on per dozen sales value at:					
	24.30	6,000	89,200	611,000	527,180
	24.10	3,000	1,600	3,000	22,300
	23.80	4,000	6,000	7,900	17,900
	23.70	3,000	4,460	5,900	13,300

DISTRIBUTION TO STRATEGIC

(Act)	(Act)	(Act)
	Contractual	
Customer Concentration	Sales Quantity	Per Mile Commercy
710,872	810,872	3,456
3,032	3,032	4,516
1,102	1,102	1,900
3,332	3,332	3,616

4.30% Per dozen freight added to costs of manufacturing

Pl.'s Ex. 98

APPENDIX A

COMPUTATION OF ESTIMATED GROSS PROFIT ON 231,500 DOZEN FROZEN FRUIT PIES IF THIS AMOUNT HAD BEEN SOLD BY UTAH PIE COMPANY IN THE DENVER, COLORADO AREA

		1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
Continental Baking Company Additional Dozens		52,000	74,500	105,000	231,500
Sales Price:					
Based on per dozen prices of:	$4.30	$223,600	$320,350	$451,500	$995,450
	$4.10	213,200	308,450	430,500	949,150
	$3.90	202,800	290,550	409,500	902,850
	$3.70	192,400	275,650	388,500	856,550
Cost of Sales*		156,000	226,480	316,050	698,530
Gross Profit:					
Based on per dozen sales price of:	$4.30	$67,600	$93,870	$135,450	$296,920
	$4.10	57,200	78,970	114,450	250,620
	$3.90	46,800	64,070	93,450	204,320
	$3.70	36,400	49,170	72,450	158,020

* 20¢ per dozen freight added to costs of manufacturing

Pl.'s Ex. 98

APPENDIX A

COMPUTATION OF ESTIMATED GROSS PROFIT OF 231,500 DOZEN FROZEN FRUIT PIES IF THIS AMOUNT HAD BEEN SOLD BY UTAH PIE COMPANY IN THE DENVER, COLORADO AREA

	1959	1960	Jan.1,1961 to Aug.31, 1961	Totals
Continental Baking Company				
Additional Dozens	37,000	24,500	105,000	231,500
Sales Prices:				
Based on per dozen prices of:				
$4.30	$223,400	$520,350	$451,500	$995,450
$4.10	213,200	303,450	480,500	949,150
$3.90	202,800	280,550	409,500	902,850
$3.70	192,400	275,650	388,500	856,550
Cost of Sales*	136,000	226,480	316,050	698,530
Gross Profit:				
Based on per dozen sales price of:				
$4.30	$67,600	$93,870	$135,450	$296,920
$4.10	57,200	78,970	114,450	250,620
$3.90	46,800	64,070	93,450	204,320
$3.70	36,400	49,170	72,450	158,020

* 20¢ per dozen freight added to costs of manufacturing

APPENDIX A

CONTRIBUTION OF ESTIMATED GROSS PROFIT UTAH PIE COMPANY
WOULD HAVE REALIZED ON SALES TO THE SALT LAKE AND DENVER DIVISIONS OF SAFEWAY STORES
IF THESE ESTIMATED ACCOUNTS HAD BEEN SOLD TO THE SALT LAKE AND DENVER DIVISIONS OF SAFEWAY STORES

	Salt Lake Safeway Division				Denver Safeway Division			
	1959	1960	Jan. 1, 1961 to August 31st 1961*	Total Salt Lake Division	1959	1960	Jan. 1, 1961 to August 31st 1961	Total Denver Division
Pet Milk Company								
Additional Dozens - Sal Air Bread (Safeway's)	25,462	22,694	9,532	58,088	40,000	30,000	20,000	90,000
Sales Price:** Per Dozen								
Apple @ $3.30	$22,092	$46,249	$19,211	$87,552	$50,424	$61,088	$38,676	$150,183
Cherry @ 3.44	25,542	16,951	9,437	51,930	40,179	22,394	18,989	81,562
Peach @ 3.56	15,530	5,705	1,187	22,422	24,350	7,583	2,421	34,354
Boysenberry @ 3.56	14,062	7,650	1,305	23,017	22,072	10,146	2,634	34,852
Mince @ 3.94	-	-	2,627	2,627	-	-	3,280	3,280
Total	$87,226	$76,555	$33,767	$197,548	$137,025	$101,106	$68,000	$306,231
Cost of Sales:***								
Apple @ $2.44	$25,674	$37,000	$15,369	$78,043	$40,339	$48,866	$30,941	$130,14[illegible]
Cherry @ 3.05	22,646	15,029	8,367	46,042	35,624	19,855	16,836	72,3[illegible]
Peach @ 3.02	13,175	4,840	1,007	19,022	20,657	6,433	2,054	29,14[illegible]
Boysenberry @ 3.02	11,929	6,490	1,107	19,526	18,724	8,607	2,235	29,566
Mince @ 2.92	-	-	1,947	1,947	-	-	3,913	3,913
Total	$73,424	$63,359	$27,797	$164,580	$115,344	$83,761	$55,979	$255,084
Gross Profit	$13,002	$13,196	$ 5,970	$32,968	$21,681	$17,445	$12,021	$51,147
Add: Freight Advantage								
30¢ per dozen Salt Lake Division	7,639	6,808	2,980	17,427				
20¢ per dozen Denver Division					8,000	6,000	4,000	18,000
Gross Profit After Freight Advantage	$21,441	$20,004	$ 8,950	$50,395	$29,681	$23,445	$16,021	$69,147

* prorated by months for full year 1961.
** based on Safeway Contract prices.
*** based on actual prices determined by Utah Pie Company for 1960.

Pl.'s Ex. 109 y

APPENDIX A

UTAH PIE COMPANY

COMPUTATION OF ADDITIONAL REVENUE UTAH PIE COMPANY WOULD HAVE RECEIVED ON PEACHES PURCHASED HAD IT PAID SAME PRICES AND BEEN ENTITLED TO SAME CONTRACT PRICES

	Apple		Cherry		Boysenberry		Blackberry		Pineapple		Peach		Total	
	Pounds	Net Sales	Pounds	Net Sales	Pounds	Net Sales	Pounds	Net Sales	Pounds	Net Sales	Pounds	Net Sales	Pounds	Net Sales
1959														
Frost N' Flame	223.0	$ 842.50	174.0	$ 660.45	134.0	$ 517.95			3,713.0	$14,462.80	3,998.5	$14,791.45	8,244.5	$ 31,295.3
1960														
Frost N' Flame	13,948.0	42,349.91	6,532.5	21,782.37	6,094.0	19,961.78	233.5	$721.15	3,758.0	13,156.00	5,746.0	19,249.81	36,513.5	116,977.0
Sonny Boy	4,150.0	12,219.00	2,744.5	8,990.79	3,207.0	9,940.56			1,935.0	6,387.75	2,441.0	7,539.30	14,477.5	47,180.0
Bel-Air									4,483.5	13,154.23	5,211.5	16,676.80	9,695.0	31,831.0
1961 (to 8/21/61)														
Frost N' Flame	21,455.5	61,730.41	3,331.0	10,316.97	4,097.0	13,837.30	50.0	165.00	308.5	1,048.90	134.5	450.58	1,774.0	5,860.45	33,150.5	101,412.4
Sonny Boy	2,36585	7,285.73	1,500.0	5,025.00	1,207.5	3,984.75							325.0	1,093.75	5,813.0	18,081.2
BayCrest	100.0	310.00	100.0	345.00	100.0	340.00									300.0	995.0
	42,290.0	$126,041.57	16,384.0	$50,140.78	14,839.5	$48,482.32	283.5	$886.15	14,196.0	$50,209.68	17,551.5	$58,707.94	3,404.0	$11,481.65	109,840.5	$340,788.0
Price Per Pound	$2.98		$3.06		$3.26		$3.18		$3.54		$3.34		$3.36			
Pounds Times Price		126,037.00		50,140.96		48,838.42		$ 1,213.38		$ 50,249.12		58,626.07		11,438.64		327,883.7
Difference		$16,719.43		$ 1,212.18		$ 4,344.10		$327.23		$ 3,730.44		$ 616.13		$ 956.99		$ 27,876.7

DISTRIBUTION TO PURCHASERS

Carnation Company	$ 7,916
Continental Baking Company	6,849
Pet Milk Company	13,910
Total	$ 27,675

* Based on Market Share Study

APPENDIX A

UTAH PIE COMPANY
ADDITIONAL REVENUE UTAH PIE COMPANY WOULD HAVE RECEIVED ON UTAH PIE BRAND SALES IF PRICES HAD BEEN BASED ON AMOUNTS AS INDICATED

	1959	1960	Jan.1,1961 to Aug.31, 1961	Total
Number of Dozens	47,127.0	45,744.5	31,534.0	124,405.5
Sales proceeds based on the following prices:				
$4.30 per dozen	$202,646	$196,699	$135,596	$534,941
4.10 per dozen	193,221	187,552	129,289	510,062
3.90 per dozen	183,795	178,404	122,983	485,182
3.70 per dozen	174,370	169,255	116,676	460,301
Net Sales proceeds actually received	184,111	164,177	107,289	455,577
Additional revenue based on following prices:				
$4.30 per dozen	$ 18,535	$ 32,522	$ 28,307	$ 79,364
4.10 per dozen	9,110	23,375	22,000	54,485
3.90 per dozen	none	14,227	15,694	29,921
3.70 per dozen	none	5,078	9,387	14,465

DISTRIBUTION TO DEFENDANT*

	Carnation Company	Continental Baking Company	Pet Milk Company	Total
$4.30 per dozen	$22,539	$17,222	$39,603	$79,364
4.10 per dozen	15,474	11,823	27,188	54,485
3.90 per dozen	8,498	6,493	14,930	29,921
3.70 per dozen	4,108	3,139	7,218	14,465

* Based on Market Study - Intermountain Area

Pl.'s Ex. 10½
(underlies (F) of 98)

APPENDIX A

UTAH PIE COMPANY
ADDITIONAL REVENUE UTAH PIE COMPANY WOULD HAVE RECEIVED ON UTAH PIE BRAND SALES IF PRICES HAD BEEN BASED ON AMOUNTS AS INDICATED

	1959	1960	Jan.1,1961 to Aug.31, 1961	Total
Number of Dozens	47,127.0	45,744.5	31,534.0	124,405.5
Sales proceeds based on the following prices:				
$4.30 per dozen	$202,646	$196,699	$135,596	$534,941
4.10 per dozen	193,221	187,552	129,289	510,092
3.90 per dozen	183,795	178,404	122,983	485,182
3.70 per dozen	174,370	169,255	116,676	460,301
Net Sales proceeds actually received	184,111	184,177	107,289	455,577
Additional revenue based on following prices:				
$4.30 per dozen	$ 18,535	$ 32,522	$ 28,307	$ 79,364
4.10 per dozen	9,110	23,375	22,000	54,485
3.90 per dozen	none	14,227	15,694	29,921
3.70 per dozen	none	5,078	9,387	14,465

DISTRIBUTION TO REFUNDANT*

	Garnation Company	Continental Baking Company	Pet Milk Company	Total
$4.30 per dozen	$22,539	$17,222	$39,603	$79,364
4.10 per dozen	15,474	11,623	27,188	54,485
3.90 per dozen	8,496	6,493	14,930	29,921
3.70 per dozen	4,108	3,139	7,218	14,465

* Based on Market Study - Intermountain Area

APPENDIX B

LOWEST PET-RITE APPLE P
SALE PRICES IN SEVEN MARKETS

(Prices are in Dozens)

Date	Salt Lake City	San Francisco	Seattle	Portland	Los Angeles	Denver	Spokane
1958							
May	5.16	4.72	4.96	5.00	4.58	4.96	5.16
June	5.00	4.68	5.00	5.00	4.58	4.92	5.16
July	5.00	4.68	5.00	5.00	4.58	4.96	5.16
Aug.	5.00	4.68	4.96	5.00	4.58	4.96	5.16
Sept.	5.00	4.68	5.00	5.00	4.58	4.96	5.16
Oct.	5.00	4.68	4.96	5.00	4.58	4.96	5.00
Nov.	5.00	4.56	4.80	4.84	4.58	4.96	4.84
Dec.	5.00	4.56	4.84	4.80	4.58	4.04	4.84
1959							
Jan.	4.44	4.04	4.36	4.44	3.90	4.36	4.44
Feb.	4.36	3.36	4.36	4.44	3.90	4.36	4.44
Mar.	4.44	4.00	4.36	4.44	3.90	4.36	4.36
Apr.	4.44	4.00	4.36	4.44	3.90	4.32	4.44
May	4.44	4.00	3.82	4.44	3.90	4.32	4.44
June	4.44	4.00	4.44	4.44	3.90	4.32	4.44
July	4.12	4.00	----*	4.64	3.94	4.00	4.04
Aug.	4.12	4.00	----	4.48	3.90	4.00	4.04
Sept.	4.12	4.00	----	4.48	3.90	4.00	4.04
Oct.	4.04	4.04	----	4.48	3.90	4.00	4.04
Nov.	4.12	4.00	----	----	3.90	4.00	4.04
Dec.	3.84	4.00	----	----	3.90	4.00	4.04
1960							
Jan.	4.12	4.00	4.12	----	3.90	4.00	4.12
Feb.	4.12	4.00	4.00	----	3.90	4.00	4.00
Mar.	4.04	4.00	----	----	3.90	4.00	4.04
Apr.	4.04	4.00	4.04	----	3.90	4.00	4.12
May	4.12	4.00	4.12	----	3.90	4.00	4.12
June	----	4.00	4.04	4.28	3.90	4.00	4.12
July	4.28	4.00	4.04	4.04	3.90	4.00	4.04
Aug.	4.28	4.40	4.48	4.40	4.25	4.00	4.48
Sept.	4.28	4.40	4.36	4.36	4.26	4.00	4.48
Oct.	4.64	4.36	4.36	4.40	4.26	4.00	4.48
Nov.	4.64	4.36	4.40	4.40	4.26	4.00	4.48
Dec.	4.64	4.40	4.00	4.48	4.26	4.00	4.08
1961							
Jan.	4.28	4.40	4.40	4.48	4.25	4.00	4.40
Feb.	4.28	4.40	4.36	4.40	4.26	4.00	4.40
Mar.	4.24	4.40	4.35	4.40	4.26	4.00	4.40
Apr.	4.08	4.48	4.36	4.40	4.26	4.00	4.40
May	4.48	4.40	4.40	4.48	4.26	3.84	4.40
June	4.64	4.48	4.40	4.40	4.26	3.84	4.40
July	4.54	4.48	4.48	4.40	4.26	4.00	4.40
Aug.	4.64	4.48	4.40	4.40	4.26	4.00	4.40
Sept.	4.64	4.40	3.80	4.40	4.25	4.00	3.80
Oct.	4.64	4.40	3.80	4.48	4.26	4.00	3.80
Nov.	4.64	4.48	3.90	4.40	4.26	4.00	3.85
Dec.	4.64	4.64	4.84	4.48	4.26	4.00	4.36

* ---- indicates no sales in that month.

Pl.'s Ex. 95

UTAH PIE COMPANY

SUMMARY OF ESTIMATED GROSS PROFITS, REVENUE AND GOODWILL LOST BY UTAH PIE COMPANY BASED ON ESTIMATED SALES LOST TO DEFENDANTS AND FROM THE EFFECT OF DEPRESSED PRICES

		Carnation Company	Continental Baking Company	Pet Milk Company	Total Three Defendants
(A)	Estimated gross profit on additional frozen fruit pies Utah Pie Company would have sold if 1958 market position in relation to defendants had been maintained				
	Based on selling price of: $4.30 per dozen	$ 32,565	$ 25,134	$ 57,555	$115,254
	$4.10 per dozen	28,136	21,755	49,769	99,660
	$3.90 per dozen	23,706	18,373	41,983	84,062
	$3.70 per dozen	19,277	14,994	34,197	68,468
(B)	Estimated gross profit on 23,000 dozen frozen fruit pies if this amount had been sold by Utah Pie Company in the Seattle, Spokane and Portland Areas				
	Based on selling price of: $4.30 per dozen	$ 10,872	$ 10,872	$ 5,436	$ 27,180
	$4.10 per dozen	9,032	9,032	4,516	22,580
	$3.90 per dozen	7,192	7,192	3,596	17,980
	$3.70 per dozen	5,352	5,352	2,676	13.380
(C)	Estimated gross profit on 231,500 dozen frozen fruit pies if this amount had been sold by Utah Pie Company in the Denver, Colorado Area				
	Based on selling price of: $4.30 per dozen		$296,920		$296,920
	$4.10 per dozen		250,620		250,620
	$3.90 per dozen		204,320		204,320
	$3.70 per dozen		158,020		158,020
(D)	Estimated gross profit on 58,088 and 90,000 dozen frozen fruit pies if these respective amounts had been sold by Utah Pie Company to Salt Lake City and Denver Divisions of Safeway Stores				
	Salt Lake Division			$ 50,395	$ 50,395
	Denver Division			69,147	69,147
(E)	Additional Revenue Utah Pie Company would have received on Private Label sales if prices had been equivalent to Safeway contract prices	$ 7,916	$ 6,049	$ 13,910	$ 27,875
(F)	Additional Revenue Utah Pie Company would have received on Utah Pie Brand sales if prices had been as follows:				
	$4.30 per dozen	$ 22,539	$ 17,222	$ 39,603	$ 79,364
	$4.10 per dozen	15,474	11,823	27,188	54,485
	$3.90 per dozen	8,498	6,493	14,930	29,921
	$3.70 per dozen	4,108	3,139	7,218	14,465
(G)	Loss due to Goodwill and "Going Business Concern" value	$ 25,000	$ 25,000	$ 25,000	$ 75,000

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(A)	Estimated gross profit on additional frozen fruit pies Utah Pie Company would have sold if 1958 market position in relation to defendants had been maintained				
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	$3.70 per dozen	4,108	3,139	7,218	14,465
(G)	Loss due to Goodwill and "Going Business Concern" value	$ 25,000	$ 25,000	$ 25,000	$ 75,000
	GRAND TOTALS				
	(A), (B), (C) and (F) based on $4.30 per dozen	$ 98,892	$381,197	$261,046	$741,135
	(A), (B), (C) and (F) based on $4.10 per dozen	$ 85,558	$324,279	$239,925	$649,762
	(A), (B), (C) and (F) based on $3.90 per dozen	$ 72,312	$267,427	$218,961	$558,700
	(A), (B), (C) and (F) based on $3.70 per dozen	$ 61,65?	$212,554	$202,543	$476,750

Appendix B

Section 2 of the Clayton Act, 38 Stat. 731, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1952).

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account

thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or

grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 3 of the Clayton Act, 38 Stat. 731, § 3 (1914), 15 U.S.C. § 14 (1952).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1952).

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 38 Stat. 731, § 13 (1914), 15 U.S.C. § 26 (1952).

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

U.S. Const. amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY and PET MILK COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PET MILK COMPANY IN OPPOSITION

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BRIEF FOR PET MILK COMPANY IN OPPOSITION

OPINIONS BELOW

The opinions below and this Court's prior opinion in this case are correctly cited in the Petition. The opinion for which review is now sought appears as Appendix A in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This action was brought under Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, which provides for the recovery of treble damages by a person injured in his business or property by a violation of the antitrust laws. The antitrust violations alleged in the complaint were violations of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, and Section 2(a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a). At this point in the litigation, there is no question of the construction or application of these statutes. The sole question is one of admissibility of evidence.

QUESTION PRESENTED

The sole question presented is whether or not the Supreme Court should grant certiorari when a court of appeals has remanded a case for a new trial after it has set aside a judgment based on a jury verdict on the ground that the trial court committed prejudicial error in the admission of evidence.

STATEMENT OF THE CASE

The petition for certiorari brings this case before this Court for the second time. The case began with a complaint filed by the petitioner, Utah Pie Company, in the United States District Court for the District of Utah against Pet Milk Company, Continental Baking Company, and Carnation Company. The complaint alleged a conspiracy among the three defendants, in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1. The complaint also alleged that each defendant independently had violated Section 2(a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C.

§ 13(a), through the sale of frozen fruit pies in Utah and neighboring states at prices lower than the prices charged for the pies elsewhere. The trial of the case resulted in a jury verdict in favor of the defendants for the alleged violation of the Sherman Act, and in verdicts against each defendant for the alleged violations of the Clayton Act. (Transcript of Record for the 10th Circuit Court of Appeals, pp. 1283-1284) Damages were awarded to the plaintiff for the violations of the Clayton Act.

On appeal by the defendants, the Court of Appeals for the Tenth Circuit reversed the judgments against the appellant-defendants, including that against the Pet Milk Company on whose behalf this brief is filed. The basis for the reversal was "that the evidence was wholly insufficient to support a finding that Pet" had violated Section 2(a) through its pricing practices in Utah. *Continental Baking Co.* v. *Utah Pie Co.,* 349 F. 2d 122 (10th Cir. 1965), rev'd. 386 U.S. 685 (1967) The Court of Appeals then directed the trial court to enter judgment in favor of Pet. (349 F. 2d at 152)

In response to the reversal, the Utah Pie Company filed a petition for a writ of certiorari in this Court. The granting of that writ was opposed by the Pet Milk Company on the ground that the Court does not grant certiorari when the sole ground for reversal by a federal court of appeals of a judgment based on a jury verdict is the insufficiency of the evidence.

At about the same time a petition for certiorari was filed in another case in which the Court of Appeals for the Tenth Circuit had reversed a judgment based on a jury verdict for the plaintiff and had directed dismissal of the action. *Neely* v. *Martin K. Eby Constr.*

Co., 344 F. 2d 482 (10th Cir. 1965), aff'd 386 U.S. 317 (1967) That petition had questioned the authority of a court of appeals to set aside a judgment based on a jury verdict and direct dismissal of an action under Rule 50 of the Federal Rules of Civil Procedure, as amended effective July 1, 1963. (374 U.S. 865, 885)

On November 15, 1965, this Court granted certiorari in response to both the *Neely* and *Utah Pie* petitions. (382 U.S. 914) In its orders, the Court asked counsel for all parties in both cases to brief and discuss at oral argument several questions on the authority of the courts of appeals, based on the question posed in the *Neely* petition.[1]

In its *Neely* opinion, the Court concluded that courts of appeals have authority to direct entry of judgment

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[1] The questions as stated in the order granting certiorari in the *Utah Pie* case were as follows:

> 1. Whether, if this Court affirms the judgment ond order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?
>
> 2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U.S. 801?
>
> 3. Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents? (382 U.S. at 914)

notwithstanding a jury verdict (386 U.S. at 321-326), although the Court suggested that the authority be used sparingly when the basis for reversal is an insufficiency of evidence. (*Id.*, at 327)

The Court did not discuss the questions in *Utah Pie Co.* v. *Continental Baking Co.* (*Id.*, at 688, n. 4) Instead the Court limited itself, as the Court of Appeals had done, to a consideration of the sufficiency of the evidence on the alleged violation of Section 2(a) by each of the respondents. The Court concluded that there was sufficient evidence to support the jury's verdict of a violation by each respondent. (*Id.*, at 704) Since the Court of Appeals had not passed on other grounds urged by the respondents, this Court remanded the case to the Court of Appeals "for further proceedings." (*Ibid.*)

On remand, the Court of Appeals accepted this Court's determination that there was sufficient evidence on the question of violations of Section 2(a) (Petition, Appendix A, p. 5); and the court moved on to the next step in Utah Pie's treble-damage action —to the proof of injury Utah Pie may have suffered as a result of the violations. The Court of Appeals concluded that Plaintiff's Exhibit 95, characterized by Utah Pie in its Petition, page 6, as its "basic damage exhibit," and exhibits on which 95 was based "presented a clearly erroneous factual foundation for the computation of damages, and that their admission was plain and prejudicial error." (Petition, Appendix A, p. 64)

One of the court's reasons for holding the "damage exhibits" inadmissible was that, in drawing up the exhibits, Utah Pie had "treated all of the price dis-

criminations of the several appellants as constituent parts of a single whole, or as joint acts of the appellants." (Petition, Appendix A, p. 33) This "would have been proper," the court said, "had Utah Pie established its conspiracy claim, but the jury returned a separate verdict against Utah Pie on its conspiracy claim . . ." (*Ibid.*) It was not a proper foundation for assessing damages for the violations of Section 2(a), since "each appellant was liable only for the injuries caused by its first § 2(a) violation and its § 2(a) violations thereafter, and it was not liable for injuries caused by the § 2(a) violations of the other two appellants." (*Ibid.*)

The court also held that opinion testimony of Utah Pie's salesman that the decline in sales of its Utah brand pies was attributable to the appellants' price discrimination was not credible, in view of Utah Pie's greatly increased sales of Frost 'N' Flame brand pie to a large customer, at prices substantially below the price of its Utah brand pie and below the defendants' prices. (*Id.*, at 27-30)

On reversing the judgment against Pet and the other appellants the Court of Appeals, consistent with this Court's opinion in the *Neely* case and with views often expressed by Mr. Justice Black, remanded the case for a new trial. To "avoid confusion and to be fair to each of the appellants," the court outlined a procedure that would permit the introduction of evidence "of general application" against all three appellants, while preserving for each the right to have evidence on its 2(a) violation and the effect of the violation on Utah Pie presented separately. (*Id.* at 48-49)

SUMMARY OF ARGUMENT

The petition for writ of certiorari presents no question of general public interest to be decided by this Court.

The case, a treble-damage antitrust action based on alleged price discriminations by three companies in the sale of frozen fruit pies in the Salt Lake market, has been under appellate review for a total of 21 months—for slightly more than three months by this Court, and for 18 months by the Court of Appeals for the Tenth Circuit.

In its final consideration of the case the Court of Appeals held that the admission by the trial judge of several exhibits, purporting to establish the amount of damage the plaintiff had suffered, was prejudicial error, and the cause was remanded to the trial court for a new trial.

Although the petition poses questions in terms consistent with Rule 19(1)(b) of this Court's rules,[2] the

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[2] Rule 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

only question that can possibly grow out of the Court of Appeals' decision is whether or not, on its review of the evidence, the Court of Appeals was correct in holding the admission of certain damage exhibits to be prejudicial error, and in ordering a new trial. A determination of the admissibility of this evidence required the Court of Appeals to examine the underlying factual basis for the exhibits, which presents no question for review by this Court. The Court of Appeals' order for a new trial is entirely consistent with repeated holdings of this Court that the admission of prejudicial evidence by a trial court can be cured only by a new trial. The Court of Appeals' direction that evidence be taken separately as against each defendant on the price discrimination charge and the resultant damage, if any, to Utah Pie is entirely consistent with elementary justice and with the *Restatement of Torts*.

There is no question, as the petition contends, of conflict with a decision of this Court on a federal question, of an invasion by the Court of Appeals of the jury's "province," of conflict between circuits on some question of law. There are no "special and important reasons" for the Court's granting certiorari and undertaking again in this case the "arduous task of searching through voluminous trial testimony and exhibits," a search that has already occupied this Court for three months and the Court of Appeals for 18 months.

ARGUMENT

I. The petition for writ of certiorari presents no federal question of broad interest for determination by the Supreme Court.

The questions presented by Utah Pie Company's petition for certiorari do not fall within any of the categories of questions set forth in Rule 19 of this Court's rules in which certiorari may be granted, although the petition attempts to bring the questions within two or three of the categories.

Actually there is only one narrow, factual question to be drawn from the Court of Appeals' decision. That is whether a proper foundation had been laid in the trial court for the admission into evidence of what petitioner calls "Utah Pie's basic damage exhibit." (Petition, p. 6) On an exhaustive review of the evidence the Court of Appeals held that a proper foundation had not been laid, and that admission of the exhibit into evidence was prejudicial to the defendants and was reversible error. So that the error might be corrected, the court directed a new trial, and outlined procedures to be followed in a new trial to prevent evidence against one defendant from clouding the issue against the other defendants. (Petition, Appendix A, pp. 48-49)

The function of the Supreme Court in granting certiorari has been ably stated by a former Chief Justice of the Court, Chief Justice Vinson, in an address before the American Bar Association, on September 7, 1949. The Chief Justice concluded his address by saying:

> "To remain effective, the Supreme Court must continue to decide only those cases which present

> questions whose resolution will have immediate importance far beyond the particular facts and parties involved." (Quoted in Stern & Gressman, *Supreme Court Practice* (1962) p. 120.)

Similar views were stated by the Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923), dismissing a writ of certiorari, and were repeated with approval in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), vacating 348 U.S. 880 (1954). In the *Rice* opinion the Court also reviewed the basis for Rule 19. (349 U.S. at 73-74)

There is in Utah Pie's petition no question "whose resolution will have immediate importance far beyond the particular facts and parties involved"; no "principles the settlement of which is important to the public"; no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal"; not even a question that, when "abstractly considered," might "present an intellectually interesting and solid problem." (See 261 U.S. at 393 and 349 U.S. at 74, 79.)

2. This case has had extensive appellate review—18 months' review by the Court of Appeals for the Tenth Circuit and three months' review by the Supreme Court.

This Court has frequently spoken of the need for assistance by the courts of appeals in reviewing extensive records usually produced in antitrust cases. In *United States* v. *Singer Mfg. Co.*, 374 U.S. 174 (1963), reversing 205 F. Supp. 394 (S.D.N.Y. 1962), Mr. Justice Clark commented critically on the Expediting Act, 58 Stat. 272, 15 U.S.C. § 29, which brings antitrust cases to which the United States is a party directly

from the district courts to the Supreme Court for review. "Whatever may have been the wisdom" of the act, the justice said, "at the time of its enactment in 1903, time has proven it unsatisfactory . . . Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." (374 U.S. at 175, n. 1) Mr. Justice Harlan expressly approved Mr. Justice Clark's statement, and spoke of the act as "an anachronism in view of the modern work load of this Court." (*Id.*, at 202)

In this case, the Court has had the "valuable assistance" of a review of the record to which Chief Judge Murrah and Judges Phillips and Lewis gave a year and a half of their time. The Transcript of Record, consisting of some 5752 pages in the original before the Court of Appeals and of 5867 pages as printed for this Court, was under review by the Court of Appeals for ten and one-half months between oral argument on July 11, 1964 and the rendering of the court's opinion on May 25, 1965. It was under review by this Court for a little more than three months, between argument on January 17, 1967 and opinion, on April 24, 1967. The case was again under review by the Court of Appeals for almost eight months, between oral argument on September 13, 1967, and opinion, on May 7, 1968. Surely, with only a question of the admissibility of evidence before it, this extensive review is reason enough for this Court not to undertake again the "arduous task of searching through voluminous trial testimony and exhibits. . ." which Mr. Justice Harlan has deplored. (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 364, 1961; affirming 179 F. Supp. 721, E.D. Mo. 1959)

3. Utah Pie's "basic damage exhibit" and the underlying exhibits are plainly erroneous on their face.

Pet Milk Company commends the thoughtful opinion of Judge Phillips to the Court; but, even without the extensive analysis made by the Court of Appeals, Utah Pie's "basic damage exhibit" and the underlying exhibits are erroneous on their face, if for only one reason. The exhibits present claims for damages for the entire year 1959, although not until December 1959 did Pet sell frozen fruit pies in the Salt Lake market at a price lower than the price elsewhere. (349 U.S. at 152) That is, not until December 1959 did any violation of law occur that might be a basis for recovery of damages by Utah Pie.

Part (A) of Pl. Ex. 95 states a claim against Pet for $34,197 profits Utah Pie would have made if it had maintained its "1958 market position in relation to defendants," based on a selling price of $3.70 a dozen; or $57,555, based on a selling price of $4.30 per dozen. (The exhibits discussed here appear in the petition in an Appendix A pages I-XVI, and a page "23" following that appendix. In the Transcript of Record for this Court when the case was before it on certiorari for the first time, October Term, 1966, No. 18, the exhibits appear on pages 4591-4607. It is believed it will be more convenient to refer in this discussion to pages in that Transcript of Record. Pl. Ex. 95 appears there on page 4591.) The $34,197 and $57,555 come from Pl. Ex. 96 (Transcript of Record 4593-4594, 4597) where it is clear that the "Additional Dozens" Utah Pie claims it would have sold in relation to Pet are given for the entire years 1959 and 1960, and for January 1, 1961 to August 31, 1961. (The close resemblance between the $34,197 shown in Part (A) of Pl. Ex. 95

and the jury's award of $44,197 in damages as against Pet strongly suggests the prejudicial nature of the admission of the exhibit.)

Similarly, Parts (B) and (F) of Pl. Ex. 95 (Transcript of Record, 4591) makes claims for damages for the entire year 1959. (See Pl. Exs. 97 and 101, Transcript of Record, 4598-4599, and 4606-4607.)

Part (B) of Pl. Ex. 95 and Pl. Ex. 97 are also without foundation when they make a claim for damages on frozen fruit pies not sold by Utah Pie in the Seattle, Spokane and Portland Areas in 1959, for Utah Pie's salesman testified that the "first attempt" of the company "to go into Portland" was made in "January of 1960" (Transcript of Record, 542); and that, with no one "permanently" representing the company in Spokane, Portland and Seattle, his two weeks' trip to the area in January or February 1961 was the only real effort made to sell pies there. (*Id.*, at 778)

Parts (D) and (E), with underlying Pl. Exs. 99 and 100 (Transcript of Record, 4591, 4602-4603, 4604-4605) are in error in making claims for damages incurred in 1959 by reason of a contract between Pet and Safeway Stores, Inc., because the contract was not entered into until December 1959, effective January 1, 1960. (Transcript of Record, 2226, 2235)

These are all errors the Court might notice under Rule 40(1)(d)(2) of its rules.[3]

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[3] Rule 40. BRIEFS—IN GENERAL. * * * Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

4. There is no conflict between the Court of Appeals' second opinion in this case and any decision of the Supreme Court.

Utah Pie's statement of its first reason for granting the writ (Petition, p. 21) is an attempt to bring the petition within that part of Rule 19(b) of the Court's rules which states that consideration will be given to a petition when "a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . ."

The Tenth Circuit's opinion in no way conflicts with a decision of this Court on a federal question, and in no way "conflicts with the decision of this Court in the self-same case." This Court, in its first *Utah Pie* opinion, decided only that the evidence had been sufficient to support the jury's conclusion that Pet's price differences created a "reasonably possible injury to competition," in the Salt Lake market, in violation of Section 2(a) of the Clayton Act. (386 U.S. at 698, 703) The Court expressly refrained from "intimating any views on the other grounds presented to the Court of Appeals . . ." (*Id.*, at 704)

The Court of Appeals in its second opinion in the case accepted this Court's determination that there had been a violation of Section 2(a). (Petition, Appendix A, p. 5) The Court of Appeals then went on to one of the other grounds presented to it: namely, to a consideration of the objections to the admission of "Utah Pie's basic damage exhibit." (Petition, p. 6)

The Court of Appeals' analysis of all evidence relevant to injury or damage to Utah Pie, and to the "basic damage exhibit" led the court to conclude that this exhibit and the exhibits on which it was based "presented a clearly erroneous factual foundation for the computation of damages, and that their admission was

plain and prejudicial error." (Petition, Appendix A, p. 64)

A conclusion by the Court of Appeals that the admission of an exhibit in the trial court was prejudicial error cannot in any way conflict with a decision by this Court that there was evidence of a "reasonably possible injury to competition" as a result of Pet's price differences in the Salt Lake market.

Utah Pie at several places in its petition (pp. 7-9, pp. 21-22) contends that this Court expressly reversed every statement of the Court of Appeals' first opinion, and that the Court of Appeals in its second opinion went ahead with complete disregard for the Supreme Court's opinion. This is simply not true.

The Court of Appeals in its second decision did say, as quoted in the Petition, p. 22, ". . . in our former opinion, we made what we regarded and still believe was an exhaustive and correct statement of the pertinent facts . . ."; but the court also expressly accepted this Court's conclusion with respect to the violation of Section 2(a). (Petition, Appendix A, p. 5) The statement of the Court of Appeals about its former opinion, as quoted above, was a preface to its comment that it would, in its second, rely upon some of the facts stated in the former opinion. (Petition, Appendix A, p. 7)

5. The Tenth Circuit has not "invaded the jury's province to decide questions of causation."

Utah Pie states as its second reason for granting a writ, that the Court of Appeals "has invaded the jury's province" on the subject of causation. (Petition, p. 24) Again Utah Pie refuses to accept the actual holding of the Court of Appeals, and Utah Pie refuses to recognize how the court approached its task. The

Court of Appeals analyzed various kinds of evidence with respect to Utah Pie's sales to determine whether or not the presentation in Pl. Ex. 95 was consistent with this evidence. The court concluded it was not, that the admission of Pl. Ex. 95 and its underlying exhibits was prejudicial error, and that a new trial must be had. (Petition, Appendix A, pp. 64-65)

The court was not weighing "contradictory evidence" to determine whether the evidence supported the jury's verdict. The court was instead determining a question of law—that is, whether the trial judge had permitted the jury to consider prejudicial evidence.

6. The Tenth Circuit's opinion does not conflict with opinions of other circuits on the interpretation of jury verdicts.

Utah Pie's third reason for granting a writ is an attempt to bring its petition within that category of cases described in Rule 19(1)(b) of the Court's rules as "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ." (Petition, p. 26)

It is true that the Court of Appeals studied Pl. Ex. 95 in view of the jury's verdict, and concluded that the award of $44,197 in damages as against Pet Milk Company was undoubtedly composed of $34,197 from (A) of Pl. Ex. 95 plus an award of $10,000 from (G) of the exhibit. This conclusion did not require a great deal of clairvoyance on the part of Judges Phillips, Murrah and Lewis. Even if the analysis of the verdict goes beyond comments by other circuits on the "mantle of impenetrable darkness" that falls over a jury verdict, the analysis is not essential to the court's final conclusion.

The court's conclusion was that the admission of Pl. Ex. 95, described as "Utah Pie's basic damage exhibit" (Petition, p. 6), and the underlying exhibits was prejudicial error, which can be cured only by a new trial.

In setting aside a general verdict and ordering a new trial for prejudicial error in the admission of evidence, an appellate court need not show that a jury relied upon the improperly admitted evidence. This Court has repeatedly made this principle clear.

> "If the [trial] court erred in admitting as testimony papers which ought not to have been received, the judgment is of course to be reversed and a new trial awarded. It is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true in point of fact, the inference is not correctly drawn. There must be a new trial . . ." *Church* v. *Hubbart*, 2 Cranch 187, 239, 2 L. ed. 249, 266 (1804)
>
> * * *
>
> "On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given . . . This testimony was clearly inadmissible . . . The evidence, too, was material . . . the case must, for this error, go back for a new trial." *Maryland* v. *Baldwin*, 112 U.S. 490, 493-494 (1884)
>
> * * *

"As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it its admission requires that the

"*Judgment be reversed, and the case remanded to the Supreme Court of the State of Washington, with directions to set aside the verdict and to order a new trial.*" *Columbia & Puget Sound R. Co.* v. *Hawthorne,* 144 U.S. 202, 208 (1892)

* * *

"Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland* v. *Baldwin,* 112 U.S. 490, 493 (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld. . . .'" *Sunkist* v. *Winckler & Smith Co.,* 370 U.S. 19, 29-30 (1962)

7. Adequate objection to the admission of Pl. Ex. 95 and the underlying exhibits was made by Pet Milk Company, Carnation Company, and Continental Baking Co.

As its fourth reason for the Court's granting a writ of certiorari in this case Utah Pie claims that the Court of Appeals has based its decision on "purported errors" to which no adequate objection was made during the trial. (Petition, p. 27) This claim is completely refuted by the 38 pages of the Transcript of Record filed with this Court on the first grant of certiorari (pages 560-598) devoted to colloquys in the trial

court on the exhibits, including repeated objections by the defendants to the admission of the exhibits.

Pet's objection to the entire theory on which Pl. Ex. 95 was based is highlighted by the fact that it attempted to elicit testimony from an expert witness on the soundness of the theory, but the testimony was stricken from the record by the trial judge on the motion of Utah Pie's counsel. (*Id.*, at 1107-1109) The objection is further emphasized by Pet's objection to the trial court's refusal to grant an instruction to the jury with respect to the basic theory of the exhibit. (*Id.*, at 15) This was the theory that Utah Pie was entitled to maintain in perpetuity 70.41% of a market including only the pies of the defendants' "house" pies and the Utah brand pie. (See Pl. Ex. 96, Transcript of Record, 4592-4593.)

8. The Court of Appeals' observations on the disputed exhibit go to the admissibility, not the weight: the Court's ruling is entirely consistent with the Second Circuit's ruling in the Schwabe case.

An exhibit found to be based on "a clearly erroneous factual foundation" and which on its face is clearly erroneous (see pp. 12-13, *supra*) is simply inadmissible; and if the admission of the evidence is found to be prejudicial the trial court's error can only be corrected by a new trial. (See quotations *supra* from *Church* v. *Hubbart, Maryland* v. *Baldwin, Columbia & Puget Sound R. Co.* v. *Hawthorne,* and *Sunkist* v. *Winckler & Smith Co.*)

The Court of Appeals' decision in this case, although it was reversing rather than affirming a trial judge's admission of evidence, is entirely consistent with the case cited by Utah Pie (Petition, p. 29), *Herman*

Schwabe, Inc. v. *United Shoe Machinery Corp.*, 297 F. 2d 906 (2d Cir. 1962). In that opinion, following the sentence quoted by Utah Pie, the court went on to say:

> "Yet it is the jury system itself that requires the common law 'judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning * * * to exclude matter which does not rise to a clearly sufficient degree of value'; 'something more than a minimum of probative value' is required. 1 Wigmore, Evidence (3d ed. 1940), pp. 409-410. *These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.* It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area; it would be foolhardy to expect a jury to do so. 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out,' Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933).
>
> "These principles required exclusion; the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take. Many decisions have rejected evidence of injury and damages comparable in weight with that submitted here." (*Id.*, at 912. Emphasis added.)

9. The Court of Appeals has said that the admission of Utah Pie's "basic damage exhibit" was prejudicial error, not that Utah Pie failed to prove its damages with "requisite certainty."

Pet still retains doubts that a company that "was immediately successful with its new line" of pies, whose "sales volume steadily increased over the" years in question, whose "financial position also improved," whose net worth more than doubled during those years, whose net income went from a loss to a substantial gain (386 U.S. at 689), whose "major competitive weapon in the Utah market was price," and whose "prices were the lowest" in its market (*Id.*, at 690) can prove damage from Pet's occasional price differences in that market with "requisite certainty." This question is not before the Court, however, and Utah Pie's sixth reason for granting a writ (Petition, p. 30), simply overlooks what it is the Court of Appeals ruled upon. The court ruled that the admission of Pl. Ex. 95 and its underlying exhibits was prejudicial error, to be cured by granting a new trial. The cases cited by Utah Pie in this part of its petition have no application to the question now before this Court.

10. The Court of Appeals' direction that the price discrimination charge and consequent damage to Utah Pie be proven separately is correct; Utah Pie's reliance on Section 433A of the Restatement of Torts, 2d, with respect to burden of proof, is misplaced.

In its seventh reason for granting certiorari (Petition, p. 32) Utah Pie takes issue with that part of the Court of Appeals' opinion that would require Utah Pie, at a new trial, to prove separately the damages resulting from each defendant's price discrimination. This, Utah Pie says, is in error in view of Section 433A of *Restatement of Torts*, 2d, which provides for

an apportionment of damages in some cases. Utah Pie also cites § 433B of the *Restatement* as placing a burden of proof for apportionment on the defendants.

Subsections (1) and (2) of this section read:

> "(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> "(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."

(Subsection (3) appears to have no present application.)

Subsection (2) is an exception to the general rule, stated in subsection (1), that normally the burden is upon the plaintiff to prove defendant was responsible for his damages, but subsection (2) is not applicable here. There was no showing that the violation of Section 2(a) by one defendant was "combined" in any way with the violation by another defendant, as is proven by the jury's verdict in favor of the defendants on the alleged conspiracy charge.

In addition, each defendant violated Section 2(a) at varying times and in varying degrees. Pet's lower prices in the Salt Lake market occurred in December 1959 ($3.80 per dozen), February and March 1960 ($3.70 per dozen), July and August 1960 ($4.00 per dozen), January and February 1961 ($3.70 per dozen), and March and April 1961 ($3.56 per dozen). (349

F. 2d at 159-160) Carnation's lower prices occurred in February and March 1960 ($3.30 per dozen), April-June 1960 ($3.48 per dozen), October 1960 ($3.90 per dozen), and November and December 1960 ($3.86 per dozen). (*Id.*, at 164-165) Continental's low prices occurred in June and July 1961 ($2.75 per dozen). (*Id.*, at 138, 141)

There is no pattern here that would permit a conclusion that "the tortious conduct of two or more actors has combined to bring about harm to the plaintiff" to require or permit a shifting of the burden of proof under Section 433A of the *Restatement.*

(In December 1959, Utah Pie's lowest price in the Salt Lake market was $3.60 per dozen, while Pet's lowest price was $3.80 per dozen; during all of 1960 Utah Pie's lowest price was $3.00-$3.10, while Pet's lowest price was $3.70 and $4.00. During the first four months of 1961, Utah Pie's lowest price was $3.10 per dozen, while Pet's lowest prices were $3.70 and $3.56 per dozen. 349 F. 2d at 159-160)

In point in the present case is Comment C under Section 433A, which reads:

> "c. *Successive injuries.* The harm inflicted may be conveniently severable in point of time. Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other."

If harm was done to Utah Pie by Pet's pricing it was independent of harm that may have been inflicted by Carnation and Continental; and Utah Pie had the

burden of proving the harm caused by Pet. This is elementary justice. To permit Utah Pie to take its total damages (assuming some damages to have been proven) and apportion them between the defendants, month by month over a period of three years, without reference in point of time to an actual violation of Section 2(a) by Pet or to the magnitude of any violation, as was done in Pl. Ex. 95 and the underlying exhibits, is clearly improper.

11. Utah Pie's reference to the Perma Life Muffler opinion in its eighth reason for granting the writ has no application in the present situation.

As an eighth reason for the Court's granting a writ of certiorari in this case, Utah Pie states that the Tenth Circuit applies an incorrect rule of causation when it directs Utah Pie in a new trial to prove separately the damages it may have suffered as a result of each defendant's 2(a) violation; and the petition contains a brief quotation from the opinion of Mr. Justice White in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). (Petition, p. 34)

In the *Perma Life* opinion the Court considered the availability of the *in pari delicto* defense when one party to an antitrust violation sues the other party for treble damages. Mr. Justice White, in his concurring opinion, urged that the defense be adapted to the aim of Section 4 of the Clayton Act. (*Id.*, at ..) That aim is to deter antitrust violations by awarding damages to those injured by the violations. This aim or purpose is best served, he said, when those primarily responsible for a violation are liable in damages to those who are injured thereby. Thus, when one who participates in an antitrust violation sues another par-

ticipant, he may recover if the other has been primarily responsible for the violation. If the two are equally guilty, according to Mr. Justice White, neither should recover from the other. "This rule," he said, "would simply pose the issue of causation in particularized form." (*Id.*, at . . . See Slip Opinion, Mr. Justice White concurring, pp. 2, 5.)

The action of the Court of Appeals, in directing that each defendant be held liable only for the damages his activity may have caused seems consistent, rather than inconsistent, with the approach suggested by Mr. Justice White.

CONCLUSION

The petition for a writ of certiorari filed on behalf of Utah Pie Company presents no question of significance to be decided by this Court. The decision below turns on its own facts and the outcome of the case will affect no one but the litigants. Because only a narrow factual issue is presented the petition should be denied.

Respectfully submitted,

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No. 367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UTAH PIE COMPANY, *Petitioner*,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit of which review is sought appears at 1968 CCH Trade Cas. ¶ 72,443. It also appears as Appendix A to the Petition and is cited "Petition, App. A, p. —" in this Brief in Opposition.

STATUTES INVOLVED

Sections 2(a), 4 and 16 of the amended Clayton Act, 15 U.S.C. §§ 13(a), 15 and 26 (1964), are the only statutory provisions involved. They are printed in Appendix B of the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the evidence purporting to establish petitioner's damages was without foundation and was so wholly unrelated to Continental's one actionable price reduction as to be insufficient to sustain the trial court's judgment.

2. Whether the Court of Appeals erred in establishing a general framework for the ordering of the proof in a second trial, and in requiring petitioner to relate its damage claim against Continental to Continental's June-July 1961 price reduction.

STATEMENT OF THE CASE

This case was initially tried to a jury before the United States District Court for the District of Utah, the Honorable Willis W. Ritter, Chief Judge, presiding. The trial resulted in jury verdicts in favor of the plaintiff-petitioner on claims that each of the three defendants, respondents here, had violated Section 2(a) of the amended Clayton Act, and against petitioner on its charge that the three defendants had conspired against it in violation of Section 1 of the Sherman Act. The trial court directed the entry of judgments in accordance with the verdicts. Defendants' motions for directed verdicts, for judgments n.o.v., and alternatively for a new trial were all denied, and no opinions, written or oral, were delivered by the district court in support of its rulings.

In support of its posttrial motions Continental specifically raised the petitioner's failure of proof on the damage issue, and renewed its earlier objections to the erroneous admission into evidence of the plaintiff's principal damage exhibits. (R. 1416-20).

When this case was initially before the Court of Appeals Continental urged numerous grounds for reversal, including these same matters having to do with proof of damage. In its first opinion the Court of Appeals found it unnecessary to deal with these contentions in light of its finding that the evidence failed to establish a prima facie violation of Section 2(a) of the Clayton Act. *Continental Baking Co., et al.* v. *Utah Pie Co.*, 349 F.2d 122, 126 (10th Cir. 1965). On certiorari, this Court reversed, holding that under the Clayton Act's incipiency standards there was sufficient evidence upon which a jury was entitled to find a violation by reason of Continental's promotional price reduction in the Salt Lake City market during June-July 1961, even if the actual impact upon Utah Pie was "negligible." *Utah Pie Co.* v. *Continental Baking Co., et al.*, 386 U.S. 685, 699-700. In remanding for further proceedings, this Court intimated no views on the other grounds for reversal that had been presented to the Court of Appeals. Id. at 704.

Following the remand, supplemental briefs were filed by all parties and additional oral argument was heard by the Court of Appeals. In a second opinion the Court of Appeals concluded that in view of this Court's holding that the evidence was sufficient to sustain a finding of a Section 2(a) violation, it could not say as a matter of law that petitioner had suffered no damage as a result of Continental's June-July 1961

pricing effort. Petition, App. A, p. 48.[1] The court held, however, that petitioner's damage exhibit purporting to show enormous losses (over a three-year period) attributable to Continental was patently unrelated to Continental's one price reduction and wholly lacking in probative value and necessary evidentiary foundation.

The court again declined to pass upon the other grounds for reversal that had been urged by Continental,[2] and instead remanded for a new trial, asserting its belief that the district court would conduct the trial in accordance with the views expressed by this Court and by the Court of Appeals. In order to assure, however, that the same confusion and prejudice that arose on the first trial by reason of the number of separate claims would not again vitiate the proceedings,[3] the

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[1] This is not to say, however, that the Court of Appeals concurred in petitioner's assertion that the mere lowering of petitioner's price in June-July 1961 makes out a prima facie case of injurious impact. As a result of its lower price, petitioner not only enjoyed record sales volume but succeeded in shutting Continental out of the market. All of this expanded volume was sold at a profit. R. 830-31. Simple arithmetic therefore destroys the contention at page 15 of the Petition that petitioner's lower price by itself establishes a loss of profits.

[2] *E.g.*, that the trial court had erroneously admitted against Continental certain highly inflammatory and damaging testimony concerning a dispute between Gaylen Rigby and the man who subsequently became Continental's broker; and that the trial court through its instructions to the jury had utterly obliterated Continental's "meeting competition" defense.

[3] When this case was first before the Court of Appeals, that court set aside the jury's verdict on Continental's counterclaim based upon petitioner's consistent local price discriminations favoring the large chain purchasers, and remanded for a new trial on the ground of possible jury confusion arising out of the multiplicity of claims and the manner in which the evidence had been presented. 349 F.2d at 156-57. The new trial ruling on Continental's counterclaim was accepted by both sides, and this second trial is now pending the outcome of the Petition for Writ of Certiorari.

court laid down guidelines for the ordering of proof. Responding in part to respondents' pleas for separate trials in the event of a new trial, the court directed that petitioner offer separately against each defendant the evidence relied upon to establish violation, injury and damage claimed against each, and that each defendant be allowed to put on its defense in direct response to the plaintiff's evidence relating to it.

ARGUMENT

I

Petitioner's effort to interest this Court again in the case against Continental by attributing to the Court of Appeals a perverse insistence upon an erroneous view of the facts does not withstand even cursory analysis. The Court of Appeals' view of the facts relevant to petitioner's claim against Continental is entirely consistent with the facts as laid out in this Court's opinion. 386 U.S. at 698-700.[4]

As this Court accurately noted, "[p]etitioner's case against Continental is not complicated." 386 U.S. at 698. During 1958, 1959 and most of 1960 Continental was for all practical purposes out of the Salt Lake City market. *Ibid.* Starting late in 1960 and up to June 1961 Continental engaged, through a broker in Salt Lake City, in "not spectacularly successful" sales efforts in an attempt to reenter the market. *Ibid.* The conclusion of this Court and of the Court of Appeals

[4] The oddly severe attack upon the Court of Appeals contained in the Petition is especially perplexing in light of counsel's statements during oral argument before this Court. The Court will recall that in response to questions by Mr. Justice Black, counsel for all parties agreed that in its prior opinion the Court of Appeals had accurately stated the facts, although counsel reserved the right to dispute certain inferences drawn from those facts.

that Continental's offer of $2.85 per dozen in June-July 1961 was "the heart of petitioner's complaint" against Continental, *ibid.*, is consistent with petitioner's admission that never prior to that time had Utah Pie reduced its price because of a price offered by Continental. Petition, App. A, p. 46, n. 16.

The Petition fails to document its flamboyant charges against the Court of Appeals with citations to instances where that court reached conclusions inconsistent with the facts stated in this Court's opinion relating to Continental. At pages 9 and 10 of the Petition there is set out in edited form a portion of this Court's opinion concerning Continental. The editing suggests that petitioner desires to imply a finding by this Court that Utah Pie suffered a loss of profits as a result of Continental's $2.85 price in the Salt Lake City market in June-July 1961. As is plain from a reading of the unedited text, 386 U.S. at 699-700, this passage was directed to the issue of violation and not to the issue of damage. Indeed, the full text makes it apparent that this Court believed a finding against Continental on the issue of violation might rest upon the possible effects of Continental's and Utah Pie's contemporaneous prices on some third seller, or on the possibility that Utah Pie might have suffered some loss had Continental continued [as it did not] to charge its $2.85 price and had Utah Pie [as it did not] failed to respond to Continental's pricing effort.

Whether there is sufficient probative evidence to support a finding that between June and September 1961 petitioner suffered a loss of sales or profits stemming from Continental's pricing is a question different from that of violation, and one upon which this Court did not pass. Indeed, there is no evidence in the record upon which a court could hold that Utah Pie's in-

creased sales, all at a profit, at its lower price resulted in any loss of profits. This issue was plainly one of the issues comprehended in the Court's statement that it was not "intimating any views on the other grounds [for reversal] presented to the Court of Appeals." 386 U.S. at 704.

We respectfully submit that aside from the groundless charge that the Court of Appeals has flouted the prior decision of this Court, the errors claimed in the petition as to Continental are not such as to merit further review. The case against Continental now contains no issue of general importance. It is not correct to claim, as does the Petition at pages 30-32, that the decision below is in conflict with those of other circuits as to proof of damage. The Tenth Circuit has neither ruled out damage evidence by competent opinion testimony based upon facts of record, nor has it required "mathematical certainty." The court applied the standard rule of law that damages may be proved with only reasonable certainty by competent evidence. It cited as a guide for the new trial *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, a case in which the Tenth Circuit itself upheld a judgment based upon interested opinion evidence approximating damages. The Court of Appeals found, simply, that in light of the facts of this record, plaintiff's principal damage exhibit lacked adequate foundation and that its admission into evidence was both erroneous and prejudicial. Nothing in the decisions of other circuits in any way conflicts with this limited holding.

Petitioner's plea is simply that this Court review the evidence and sift out the merits of the Court of Appeals' conclusions respecting the adequacy of the

damage exhibit. To this question we now turn, though in the belief that no issue warranting further review is presented therein.

II

In reviewing petitioner's damage evidence to determine if it was properly admitted and whether it met the modest requirements that have been established for the sufficiency of such proof, the Court of Appeals was performing only the usual task that courts of appeals are called upon to perform daily. *See, e.g., Herman Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962), *cert. denied*, 363 U.S. 811; *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19.[5]

The Court of Appeals' analysis discloses gross defects in the damage evidence, and numerous fundamental underlying assumptions that were unsupported by and, more often than not, contradicted by the undisputed facts of record. Significantly, petitioner has not attempted to show that the Court of Appeals' analysis was faulty, or that the damage evidence can in fact be

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[5] Petitioner's assertion (Petition, pp. 27-29) that the Court of Appeals erred because inadequate objections to petitioner's damage evidence were registered in the trial court is wholly lacking in substance. Objections were made and they fairly encompassed the grounds ultimately relied upon by the Court of Appeals, *e.g.*, R. 564-65, 567, 578-79, 580, 583-84, and 585.

If the trial court failed to understand fully the grounds for these objections, the failure is attributable to the court's disinclination to permit meaningful voir dire or cross-examination of petitioner's damage witness. Indeed, the trial court at times evidenced a perplexing hostility toward respondents' efforts to probe the weaknesses in petitioner's damage evidence. *E.g.*, R. 566, 567, 572, 591, 592, 597-98, 874-76.

rationalized on the basis of the record facts. Rather, petitioner's contention appears to be that the flaws in its proof were not of sufficient consequence to warrant setting aside the judgment and ordering a new trial. In fact, however, the Court of Appeals' analysis shows that petitioner's damage evidence was so wholly indefensible in so many central respects, and so plainly prejudicial that it would be grossly unjust to permit the trial court's judgment against Continental to stand.

Petitioner's main damage exhibit was Pl. Ex. 95, which appears at R. 4591. This exhibit was supported by Pl. Exs. 96-101 (R. 4592-4607) which simply display the arithmetical computations used in developing the figures on Pl. Ex. 95. This exhibit which appears clearly to have entered into the jury's consideration of the damage question,[6] purported to measure peti-

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[6] Petitioner accuses the Court of Appeals of attempting to "psychoanalyze" the jury because of the court's observations concerning the amount of the verdicts coinciding with figures appearing on the exhibit in question. The charge is an unfair one. Unless the rule of harmless error is to be abandoned and reversals for trial court error are to become automatic, a reviewing court must be free to consider all of the facts of record including the amount of the verdict, in order to determine whether trial court error appears to have been prejudicial. *Compare*, Schaffer v. Universal Rundle Corp., 1968 CCH Trade Cas. ¶ 72,505 (5th Cir. 1968).

Petitioner's similar claim (Petition, pp. 24-25) that the Court of Appeals took over the jury's function of determining causation does not apply to the Continental case. The quotations relied upon do not relate to petitioner's claim against Continental for lost sales and profits in the summer of 1961. The Court of Appeals has not denied the jury's right to find that Continental's $2.85 price to the limited customers it could serve "caused" petitioner to reduce to $2.75 its price on its larger pies to all customers for substantially longer periods of time, or that it "caused" petitioner to lose rather than gain sales.

tioner's losses according to an accounting formula entirely unrelated to the facts of petitioner's case against Continental. Thus the formula yielded supposed damages based on sales purportedly lost by petitioner to Continental as a result of price discriminations throughout 1959 and 1960 when Continental was for practical purposes out of the market and when no discrimination in its prices existed. See Pl. Ex. 96. The formula also purported to calculate damage on the plainly false assumption that petitioner's own dominant position in private label during the later years was not a factor to be taken into account in evaluating the causes of its lower sales of "Utah" label. This unfounded assumption necessarily underlay a substantial portion of the claim against Continental for lost sales in the Salt Lake City market, and yet it was not only contradicted by the record of actual sales, as noted by the Court of Appeals, but was contradicted by petitioner's own damage witness who repeatedly testified that private and proprietary brands were fully competitive in the market. R. 815, 872. *See also* R. 596-98.

Petitioner claims error in that the Court of Appeals failed to consider the portion of its damage exhibit purporting to measure a loss of profits by reason of reduced prices charged in response to Continental. Petition, pp. 14-15. But here again, the formula underlying Pl. Ex. 95 results in purported losses to Continental because of reduced prices throughout an entire two-and-a-half year period. This, too, is in complete contradiction of the testimony of petitioner's damage witness that he never reduced a price in response to Continental prior to June 1961. Pl. Exs. 95 and 101, R. 4591, 4606; Petition, App. A, p. 46, n. 16. And the *minimum* price upon which petitioner's

exhibits computed such alleged losses was $3.70 per dozen, although, as this Court has noted, at the time of Continental's attempted reentry into the Salt Lake City market, petitioner's going price for its Utah label was $3.40 while its discriminatory private label sales were at $3.10. 386 U.S. at 698.

Similarly, the "goodwill" figure relied upon by petitioner to support the judgment had no connection to the case against Continental, except in the now dead conspiracy claim. The $25,000 arbitrarily allocated to Continental by the witness on the instructions of petitioner's counsel did not even purport to relate to the June-July $2.85 promotion. There is no evidence anywhere that petitioner lost any goodwill at all because of Continental's June 1961 price.

Petitioner's case against Continental is not one in which proof of damages in a reasonably approximate amount presents unusual difficulties. *Compare Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251. If petitioner was damaged by Continental it was damaged because it earned less money in and around June-July 1961 by reason of lost sales, lower price, or both. Such loss of profits, if any,[7] as may have occurred can never be proven with absolute certainty; but certainty is not required under the decision of the Court of Appeals. All that the court has required is that petitioner come forward with *some* probative evidence that relates to the one claim of violation against Continental and from

[7] Even petitioner concedes that "If Utah Pie had cut price and thereby *gained* market share, it might be argued that impact was not proven." Appellee's Supplemental Brief on Remand, p. 35. The truth is that impact is not necessarily proven even if market share declines, so long as increased volume results from the lower price, as it did here.

which a reasonable approximation of damages, if any, can be drawn. That such evidence might at best yield figures in the hundreds rather than the hundreds of thousands of dollars may in a sense explain the lack of such evidence in the present record, but it does not justify it.

Petitioner also argues vaguely that the Court of Appeals erred in not considering as adequate proof of damage certain other evidence that can be culled from the record consisting chiefly of raw data concerning prices, costs and sales volume, and occasional, isolated expressions of opinion on a variety of matters. Petition, pp. 17-19. But such evidence, standing alone, would not support a jury determination of damages against Continental in any reasonably approximate amount related to the alleged violation. Nor, of course, is this the evidence upon which petitioner relied in arguing the computation of damages to the jury. Confronted with a similar argument, the Court of Appeals for the Second Circuit, in the *Schwabe* case, *supra*, observed that a judge with days in which to study the exhibits might come up with some rational computation of damages on a theory wholly different from that advocated by the plaintiff's damage witness, but that it would be foolhardy to expect a jury to do so. 297 F.2d at 912, n. 7. This reasoning from a case upon which petitioner places substantial reliance is equally applicable here.

Petitioner's entire damage case to the jury was built upon its Exhibit 95 (in its original form a chart several feet in size). Even if the amounts of the verdicts did not match the numbers on this exhibit, it would have to be assumed that the exhibit, emphasized as it was during the trial and in closing argument, *e.g.*, R. 574-78,

1265, 1272-80, would have had an important impact upon the jury's deliberations. This being so, the Court of Appeals' holding that justice requires a new trial is plainly correct.

III

In remanding the case to the district court for a new trial the Court of Appeals directed that petitioner, after introducing its evidence of general applicability, proceed with its case against one of the three defendants and that that defendant then present its defense, before evidence relating to petitioner's claims against the remaining defendants is received. In so ordering the proof the Court of Appeals was acting well within the scope of authority granted to it by Section 2106 of the Judicial Code. That section empowers the courts of appeals to set aside trial court judgments and, on remand, to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1964).

The Court of Appeals had previously found in setting aside the verdict against petitioner on Continental's counterclaim that the number of claims combined with the manner in which evidence was allowed to be introduced during the first trial had rendered the jury's task a difficult if not an impossible one. 349 F.2d at 156-57. The court also found that petitioner, while purporting to allocate its supposed losses in a detailed and impressively "expert" manner, had in fact put forward exhibits that, like those in the *Schwabe* case, *supra*, contained

> "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." 297 F.2d at 912.

In setting down the procedure to be followed at the new trial to avoid a repetition of confusion and prejudice the Court of Appeals plainly acted within the bounds of discretion permissible under Section 2106, and indeed petitioner appears not to contend otherwise.

Petitioner does contend, at pages 32 to 34 of its Petition, that along with laying down the general framework for the ordering of the proof in the second trial, the Court of Appeals imposed an improper substantive burden of proof upon petitioner to establish with particularity the damages allegedly caused by each of the defendants. This contention rests upon an apparent misconception of what the court did.

The Court of Appeals did not hold, as petitioner suggests, that as a general matter petitioner must establish with any specified degree of certainty that one defendant rather than another proximately caused any particular loss. Whether and to what extent petitioner should now be required to pinpoint its alleged losses as flowing from the acts of one rather than another of the defendants must largely depend upon the evidence adduced, and the burden may well vary, depending upon the proof, from one defendant to the other. Even the Restatement rule relied on by petitioner (Petition, pp. 32-33) could be applied consistent with the Court of Appeals' mandate, although such an application of the rule appears unprecedented.[8]

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[8] This rule, set forth in Restatement, Torts § 433 b(2), would place the burden of allocating damages upon concurrent wrongdoers where their tortious conduct "has combined to bring about harm to the plaintiff." Petitioner points to no instance where the rule has been applied in a case like the present one, and our research has disclosed none. What does appear from the cases from which the pertinent Restatement illustrations are drawn is that application of the rule has so far been limited to situations

Had the Court of Appeals granted the defendants' prayers for wholly separate trials, petitioner would of course have been required to prove its damages on each trial, each time bringing home its damage claim as best it could to the defendant involved. Instead of granting wholly separate trials the lower court has attempted to steer a middle course. The requirement that petitioner offer proof of violation, injury and damage separately as to each defendant merely reflects the procedure that the Court of Appeals found desirable to permit the jury rationally to parse out the merits of what are, in fact, four separate antitrust cases. It does not determine petitioner's substantive burden of proof.[9]

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where an injury is "indivisible" and "it is impossible to determine" the proportion each defendant has contributed. Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951). See generally, cases cited at Restatement, Torts 2d (Appendix) 144 (1966). Such cases commonly involve chain collisions, flooding of land by water from two or more sources, and accidents causing aggravation of pre-existing injuries, all of these being instances where the only alternatives to relieving the plaintiff of the normal burden of proof are to deny recovery altogether or to engage in purported allocations having no real basis in fact or logic. In the present case, by contrast, petitioner has until now always claimed to be able to make a rational apportionment of its losses to each of the defendants; and, as shown *infra*, there is no excuse for the absence of probative evidence definitely tracing the damage claim against Continental to the single pricing episode in issue.

[9] The suggestion that the Court of Appeals laid upon the petitioner an unduly difficult burden of proof on the damage issue is belied by the number of times that court has recognized and given effect to the modest standard of proof that emerges from this Court's decisions in the antitrust area. See Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618, 623 (10th Cir. 1965), *cert. denied*, 383 U.S. 945; Mechanical Contractors' Bid Depository v. Christiansen, 352 F.2d 817, 821 (10th Cir. 1965), *cert. denied*, 384 U.S. 918; Union Carbide & Carbon

In the case of Continental, the Court of Appeals said that petitioner's damage claim should be definitely tied to the alleged violation which occurred in June-July 1961. Petition, App. A, p. 49. Although this is the only point at which the court's opinion bears specifically upon petitioner's substantive burden of allocating damage, the Petition makes no mention of this and instead addresses itself to general but unspecified difficulties allegedly inherent in allocating damages among all the defendants. Petition, p. 33. The reason for this generalized form of attack upon the Court of Appeals' decision is obvious. There is simply no room for petitioner to claim any difficulty in attributing losses, if any, suffered by reason of Continental's price reduction to one or the other of the defendants. Continental alone among the defendants lowered its price in June-July 1961. Only Continental can be liable for any damages thereby incurred. The details pertaining to Continental's few sales are fully known, as are the details of petitioner's own sales. If, in spite of its record high sales volume during that period and its record profits for the year, petitioner claims damage as a result of lost sales to Safeway, or lower prices, or both, that claim can be calculated on a rational basis. No reason existed for the Court of Appeals to fre-

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Corp. v. Nisley, 300 F.2d 561, 595 (10th Cir. 1961), *cert. dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801; Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 958-59 (10th Cir. 1959), *cert. denied,* 363 U.S. 843; Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 426-27 (10th Cir. 1952), *cert. denied,* 344 U.S. 837. Indeed, in its brief filed in the Court of Appeals petitioner relied heavily upon the *Atlas Building* case, *supra,* as establishing the correct rule governing the quantum of proof (Appellee's Supplemental Brief on Remand, pp. 38-40) and the Court of Appeals in remanding for a new trial, cited *Atlas Building* as defining the standard applicable to petitioner "to meet its burden of proof." Petition, App. A, p. 48.

plaintiff from its burden of proving any damages it claims to have suffered in the summer of 1961 by reason of Continental's abortive attempt at reentry into the market.

CONCLUSION

Petitioner has demonstrated no cogent reason why this Court should intervene at this stage and prevent the case against Continental from being retried. The Court of Appeals is obliged, and should be permitted, to make just the careful review of the record that it did make. Its unanimous opinion is in no way inconsistent with this Court's review of the case against Continental. On the record made against Continental, the court below would have been entirely warranted in again ordering entry of final judgment against petitioner for failure of proof. It did not do so. No issue of public importance remains in the case. Certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY,

Petitioner,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY AND PET MILK COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARNATION COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY,

Petitioner,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY AND PET MILK COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARNATION COMPANY

QUESTION PRESENTED

Whether the Court of Appeals on remand from this court for further proceedings on issues as to which the Court of Appeals had not yet passed and as to which this court expressly refused to intimate any views:

A. Erred in determining that the trial court had committed prejudicial error in admitting over respondent's objections exhibits prepared by petitioner's accountant and purporting to show petitioner's damages and in remanding the case for a new trial, and

B. Erred in directing, in order to avoid confusion and to be fair to the parties, the order of proof on retrial in a case

consolidated for trial which involved three separate Section 2(a) claims against three different defendants.

STATEMENT OF THE CASE

This case originally was a suit for damages under Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. §15, brought by petitioner Utah Pie Company against three of its competitors in the manufacture and sale of frozen fruit pies: Continental Baking Company, manufacturer of Morton brand; Carnation Company, manufacturer of Simple Simon brand; and Pet Milk Company, manufacturer of Pet-Ritz brand and Swiss Miss brand. Petitioner claimed damages for an alleged conspiracy of all three of the respondents in violation of Section 1 of the Sherman Act and alleged separate and individual violation by each of the respondents of Section 2(a) of the Robinson-Patman Act. The jury returned a verdict for the respondents on the Sherman Act conspiracy charge but returned verdicts against each of the respondents individually on the Robinson-Patman charges.

Respondent Carnation Company (hereinafter "Carnation") appealed to the Court of Appeals for the Tenth Circuit on the grounds:

1. That the evidence was insufficient to support a finding that the effect of any price differences of Carnation may be substantially to injure competition.

2. That the evidence was insufficient to support a finding that the price differences of Carnation were the proximate cause of any injury to Utah Pie Company.

3. That Carnation was entitled to a new trial because of prejudicial error by the trial court in its instructions to

the jury, its rulings on admission into evidence of petitioner's damage exhibits and its refusal to sever for trial the separate Section 2(a) claims against the three different respondents.

The Court of Appeals reversed the judgment below, addressing itself to the single threshold issue of whether the evidence against each of the respondents was sufficient to support a finding of possible injury to competition within the meaning of Section 2(a) and holding that it was not (349 F.2d 122). This court granted certiorari (382 U.S. 914) and reversed (386 U. S. 685), holding as to Carnation:

> We cannot say that the evidence precluded the jury from finding it reasonably possible that Carnation's conduct *would* injure *competition.* 386 U. S. at 701 [Emphasis supplied.]

This court's order on remand to the Court of Appeals stated:

> Since the Court of Appeals held that petitioner had failed to make a prima facie case against each of the respondents, it expressly declined to pass on other grounds for reversal presented by the respondents. 349 F.2d 122, 126. Without intimating any views on the other grounds presented to the Court of Appeals, we reverse its judgment and remand the case to that court for further proceedings. *Id.* at 704.

On remand, all issues not theretofore passed upon by this court were rebriefed and reargued to the Court of Appeals. As to the second ground urged by Carnation for reversal, i.e. that the evidence did not support a finding that any price differences of Carnation were the proximate cause of any injury to the plaintiff, the Court of Appeals stated:

> In view of the Supreme Court's decision in these cases, we must assume that under the evidence the jury was warranted in finding that Carnation had violated § 2(a). That being so, we do not think it can be said as a matter of law that Utah Pie suffered no damages proximately caused by such violations. (App. A, p. 73)[1]

On the grounds urged by Carnation for a new trial, the Court of Appeals did not reach the asserted erroneous instructions. It stated:

> We deem no useful purpose would be served by a discussion by us of the instructions offered and refused, or those given. No doubt, on a new trial the charge to the jury will be recast to conform to the views expressed in the opinion of the Supreme Court and in this opinion. (App. A, p. 49)

The Court of Appeals did agree with Carnation's contention that the introduction of plaintiff's damage exhibits constituted prejudicial error and on that ground alone reversed and remanded for a new trial. (App. A, pp. 73-74)

The Court of Appeals in its two opinions in this case adopted the procedure of discussing first the relevant market facts applicable to the frozen pie industry in Salt Lake City generally as they affected petitioner, the three respondents and other sellers in the market. It then discussed the record separately as to each of the respondents. This same practice was followed by this court in its opinion. In order to avoid

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[1]The opinion of the Court of Appeals on remand is set forth in Appendix A to the petition and is hereinafter referred to as "App. A."

the confusion it had found in the record at the original trial[2] the Court of Appeals, while it did not order severance for trial as requested by Carnation, directed a similar procedure for the order of proof by each of the parties (App. A, pp. 48-49).

ARGUMENT

Stripped of its excess verbiage and the camouflage of form designed to meet the requirements of this court's Rule 19, petitioner in effect contends:

1. That somehow the Court of Appeals has failed to comply with this court's mandate that it consider and pass upon issues not already decided by this court.

2. That somehow the Court of Appeals' ruling on the admissibility of evidence is in conflict with rulings of other courts of appeal.

3. That somehow the Court of Appeals' direction to the trial court as to the order of proof on retrial of a case involving a multitude of facts and the separate and individual conduct of three different defendants, all in active competition with each other as well as with the plaintiff, is unfair to the plaintiff.

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[2]The Court of Appeals had noted in its first opinion:

> Utah Pie's conspiracy claim and § 2(a) claims and Continental's counterclaim were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation (349 F.2d at 156-7).

We take these contentions in order.

I. THE COURT OF APPEALS CLEARLY COMPLIED WITH THIS COURT'S MANDATE.

In its earlier decision of this case this court was careful to limit its ruling to the single issue of whether the evidence against each of the respondents was sufficient to support a finding of probable injury to competition within the meaning of Section 2(a). It expressly declined to express any views on the other issues not passed upon by the Court of Appeals and remanded the case to that court for further proceedings on those issues. (386 U. S. at 704)

The Court of Appeals leaned over backward to comply with this court's rulings. It leaned so far that it considered that this court's decision had disposed of the causation issue as well as the injury to competition issue, holding that this court's conclusion — that it could not say that the evidence precluded the jury from finding it reasonably possible that Carnation's conduct would injure *competition* — precluded the Court of Appeals from finding "as a matter of law" that *Utah Pie* suffered no damage proximately caused by Carnation's violations of Section 2(a). (App. A, p. 73). Despite its earlier conclusion that the evidence did not warrant a finding that Carnation's activities in the market had injured Utah Pie (349 F.2d at 155) and despite the fact that the statutory test this court pronounced with respect to injury to competition "looks forward on the basis of proven conduct in the past", (386 U. S. at 703) the Court of Appeals apparently considered that the questions of impact and proximate cause in this case were resolved as a matter of law by this court's opinion.

It is submitted that rather than "disregard [ing] the pronouncements of this Court" (Pet. p. 21), the Court of Ap-

peals interpreted the mandate so as to read an important issue out of the case in a manner favorable to petitioner Utah Pie. How petitioner can now claim the Court of Appeals has invaded the jury's province in a manner adverse to Utah Pie defies imagination.

Certainly as to any issues under the antitrust laws the Court of Appeals followed the mandate of this court. The new trial issues of admissibility of evidence and severance to avoid confusion and to promote fairness are inherent in any lawsuit and are matters upon which a court of appeals rules routinely without this court finding it appropriate to invoke its certiorari jurisdiction.

II. THE RULING OF THE COURT OF APPEALS ON THE ADMISSIBILITY OF EVIDENCE COMPORTS WITH RULINGS OF THIS COURT AND OTHER COURTS OF APPEAL.

The Court of Appeals has concluded that petitioner's damage exhibits (Exhibits 94-101) presented "a clearly erroneous foundation" for the computation of damages as to Carnation (App. A, p. 74) and held that the admission of this evidence was "plain and prejudicial error." On that basis the court has ordered a new trial of the Section 2(a) claims against Carnation.

The Court of Appeals analyzed the record at length (App. A, pp. 25-38) to demonstrate clearly why Exhibit 95 and the exhibits on which it was based so distorted the undisputed facts of record as to Carnation as to mislead the jury and to require a new trial.

These exhibits were predicated on five erroneous theses wholly unsupported by any evidence and contrary to the undisputed documentary evidence:

1. The exhibits charged Carnation with damages for the full three-year period (1959-1961) although this court found Carnation's § 2(a) violations did not commence until 1960. (App. A, pp. VI, VII, IX, XI, XIV, XV; 386 U.S. at 701)

2. The market share on which the computations were based excluded the sales of other sellers in the market who held 18.9% of the volume in 1959, 12.8% in 1960 and 8.1% in 1961. (App. A, pp. VI, VII; R.596; 386 U.S. at 691)

3. The market share on which the computations were based excluded the sales of private and controlled labels of like grade and quality,[3] which sales constituted about one-half of petitioner's volume in 1960 and 1961 and accounted for 23.1% of the total sales in the market in 1959, 38.5% in 1960, and 31.9% in 1961. (App. A, p. VI; R.595; 386 U.S. at 691)

4. The exhibits allocated damages based on the assumption that as between petitioner and Carnation, petitioner was entitled (without regard to the independent competitive tactics of all the other sellers during the period) to retain the 67% of the market it captured in its first full year in the business by a practice of selling at prices well below the prevailing market. (App. A, pp. VI, VII, VIII, Ex. 95; 386 U.S. at 690, 703)

5. The exhibits allocated the claimed damages to petitioner's good will equally among the three respondents, not based on any evidence, but on the instructions of petitioner's own counsel to petitioner's accountant. (App. A, Ex. 95; R.529)

To compound the error in admitting these exhibits over Carnation's objection that they were distortions of the record, the trial court specifically instructed the jury that it might consider these fabricated damage exhibits in fixing the amount of damages (R.1241).

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[3]This court expressly noted the important effect of private label sales in depressing overall market prices. (386 U.S. at 696 n.10)

The prejudicial effect as to Carnation of the distorted damage exhibits on the jury's verdict is clear. The amount of the verdict against Carnation, $29,277, as the Court of Appeals observed (App. A, p. 33), was exactly $10,000 more than the sum allocated to Carnation in Part A of Exhibit 95. Similar coincidence is apparent in each of the verdicts against the other two respondents. The amount of the verdict against Carnation reflects the fact that the correct market shares [shown on Exhibit 62 and adopted by this Court (386 U.S. at 691)] were gerrymandered by petitioner's accountant in preparing Exhibits 94-101. While Carnation's total sales in 1960 and 1961 [the years in which this Court held the jury was not precluded from finding Carnation had violated Section 2(a)] constituted only 10% of the total sales in the market during those two years, Carnation was assessed 30% of the total damages.

Far from departing from the decisions of this court or of other courts of appeal in setting aside a general verdict and ordering a new trial because of the admission of incompetent and prejudicial evidence, the ruling of the Tenth Circuit in this case follows similar rulings of this court dating from *Maryland, ex. rel. Markley* v. *Baldwin*, 112 U.S. 490 (1884), down to *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

This court[4] and all of the courts of appeals[5] since *Bigelow*

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[4]*Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

[5]*Momand* v. *Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948); *Enterprise Industries* v. *Texas Co.*, 240 F.2d 457 (2d Cir. 1957); *Lawlor* v. *National Screen Service Corp.*, 270 F.2d 146 (3rd Cir. 1959); *Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Rushing* v. *Metro-Goldwyn-Mayer Distributing Corp.*, 214 F.2d 542 (5th Cir. 1954); *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir. 1965); *Blaski* v. *Inland Steel Co.*, 271 F.2d 853 (7th Cir. 1959); *National Wrestling Alliance* v. *Myers*, 325 F.2d 768 (8th Cir. 1963); *Flintkote Co.* v. *Lysfjord*, 246 F.2d 369 (9th Cir. 1967); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 853 (10th Cir. 1959).

have held many times that while an antitrust plaintiff need not prove its damages with certainty, such a plaintiff may not recover on the basis of mere speculation, surmise and conjecture. What the Court of Appeals rejected in the case at bar was not only mere speculation, surmise or conjecture, but was a distortion of the undisputed facts — a distortion designed to mislead the jury from a fair analysis of the facts to a clearly erroneous foundation for the computation of damages. That is what the Court of Appeals found and that is the basis on which it ordered a new trial.

This court has held only that Carnation's contributions to the declining price structure in the Salt Lake market may have created a reasonable possibility of injury to competition. Other than noting that petitioner Utah Pie was at times the leader in moving prices down (386 U.S. at 703), this court has intimated no views as to whether Utah Pie had suffered damages. All the Court of Appeals has now held is that Utah Pie must prove its damages against each respondent by competent evidence and not by distortions of the record or the speculations and surmises of its counsel and its accountant. Such a holding is in full compliance with the mandate of this court and comports with the accepted and usual course of judicial proceedings.

III. THE RULING OF THE COURT OF APPEALS REGARDING THE ORDER OF PROOF ON RETRIAL WAS A PROPER EXERCISE OF ITS DISCRETION.

As the Court of Appeals pointed out in its first decision in this case, 349 F.2d at 156-157, evidence applicable to one respondent was commingled and confused with evidence applicable to the other respondents, creating a nearly impossible

task for the jury to consider fairly the case against each respondent individually. With the conspiracy count eliminated on retrial, petitioner now has three separate actions against separate competitors, each engaging in different competitive conduct with different competitive effect.

Pursuant to its authority under 28 U. S. C. §2106, the Court of Appeals has fashioned guidelines for the retrial of this particular case in light of that situation. Its decision in this respect involves no departure "from the accepted and usual course of judicial proceedings." (Sup.Ct. R.19)

This court, in its opinion in *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960), adverted to the problem of fairness when unrelated defendants face a joint trial after failure of the conspiracy claim on which the original joinder was based:

> Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice.

While the Court of Appeals did not feel it necessary to go so far as to order severance or to designate a different judge to avoid a repetition of the prejudicial errors by the court below on retrial of this action, *Cf. Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 142 (1967); *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959); *Haver-*

hill Gazette Company v. *Union Leader Corporation*, 333 F.2d 798 (1st Cir. 1964); *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804 (9th Cir. 1963), it has designated a procedure for the orderly presentation of proof in light of the past record below. What petitioner really decries now is the loss of the tactical advantage of trying its case as if there were a conspiracy among the respondents, although as the Court of Appeals has noted, "The record clearly establishes and the jury found there was no consp -acy, no concert of action by the appellants" (App. A, p. 48).

The procedural directive of the Court of Appeals merely eliminates the prejudice inherent in a situation where the acts of one defendant, proved along with different acts of another, may in the minds of an unnecessarily confused jury tarnish the wrong party. *Kotteakos* v. *United States*, 328 U. S. 750 (1946).

These procedural suggestions by the Court of Appeals are particularly appropriate as to Carnation, whose violations of Section 2(a) only commenced in 1960 and which had no private label "exclusive dealing" contract, no "fighting brands," no "industrial espionage," no "broker's grudge," and no "dive bombing" price tactics, all of which inflammatory charges were indiscriminately made by petitioner during the course of the original trial.

Carnation expressly urged that if the Court of Appeals should order retrial, it should also direct severance for trial to eliminate that very unnecessary prejudice against it. The Court of Appeals in its discretion has not ordered severance, but has fashioned a procedure to minimize the unfairness this court has noted must exist when three separate defen-

dants charged with three separate torts are tried together. Its directive to prevent a repetition of the confusion that occurred at first trial goes no further than that authorized by Rule 42(b) of the Federal Rules of Civil Procedure and is very similar to that expressly approved in *United States* v. *Knauer*, 149 F.2d 519 (7th Cir. 1945) *aff'd* 328 U.S. 654 (1946).

Nor can petitioner point to any prejudice to it resulting from the elimination of the color of conspiracy on new trial. Petitioner discloses its true desires when it relies on a discussion of the problems of proof of causation in a *conspiracy* case, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, ... U.S. ....., 20 L.Ed.2d 982 (1968).

Petitioner asks that this court again review a lengthy record already twice reviewed by and twice argued before the Court of Appeals to determine whether the application of the principles of Rule 42(b) to the facts of this case was an abuse of discretion by the Tenth Circuit. Such a request does not merit the exercise of the certiorari jurisdiction.

CONCLUSION

The Court of Appeals of the Tenth Circuit has carefully followed this court's mandate to consider and pass upon the issues remaining in light of this court's decision. It has merely found that prejudicial error was committed in the admission of certain of petitioner's exhibits and has ordered a new trial on that ground. Further, to eliminate the confusion in the record created at the first trial, it has specified an orderly procedure for the presentation of evidence, which

procedure in no way affects anyone's burden of proof. Both of these rulings were correct and neither warrants exercise of this court's certiorari jurisdiction.

For these reasons, it is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 367

UTAH PIE COMPANY,

Petitioner,

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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In the Supreme Court
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No. 367

Utah Pie Company,	*Petitioner,*
vs.	
Continental Baking Company, Carnation Company, and Pet Milk Company,	*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

Each of the respondents in this case has filed a brief in opposition to petitioner's Petition for a Writ of Certiorari. Petitioner submits this reply brief not for the purpose of reiterating the reasons for granting the writ set out in its Petition, but rather to answer certain points made in those briefs in opposition, and to correct several significant misstatements of the record by respondents.

Petitioner also wishes to point out that issues raised by respondents, properly considered, would seem to require the granting of the writ, rather than its denial.

We shall consider seriatim respondents' arguments as they relate to the QUESTIONS PRESENTED in the Petition.

QUESTION 1:

As petitioner has demonstrated in its Petition, the Tenth Circuit has budged not one inch from its erroneous view of the facts in this case, despite this Court's decision reversing its prior decision based on that erroneous view.

Respondents argue that the Tenth Circuit's present decision is right based on the record.

Petitioner has already demonstrated, and this Court has held, that the Tenth Circuit's opinion is wrong, time after time, when the numerous conflicts of evidence and inference are resolved in a manner calculated to sustain the verdicts, not reverse them.

The Tenth Circuit's present decision deprives petitioner of its jury verdicts by reading the record in the light most favorable to the respondents—a deprivation of petitioner's Seventh Amendment rights. This, alone, would warrant the grant of the writ, even if these cases were now before this Court for the first time.

Granting the writ is even more important here because the Tenth Circuit has steadfastly adhered to its original view of the facts (respondents' version) in the teeth not only of the record but also of the prior decision of this Court.

Respondents have attempted to wish away the flat conflicts between this Court's prior decision and the Tenth Circuit's subsequent opinion with the argument that this Court considered only the "violation" portion of the case, and the Tenth Circuit's subsequent opinion dealt with "impact" and "damages".

This is a difference without a distinction in a case of this sort. The "violation" is not just discriminatory pricing on respondents' part, but discriminatory pricing with an impact upon competition severe enough to make the discriminations unlawful. Respondents' discriminations, as such, were only the starting point of this Court's inquiry when it last considered this case. This Court went on to examine the evidence of the likely effect of respondents' discriminations, and reached very specific conclusions about the facts—detailed conclusions which the Tenth Circuit has subsequently disregarded in a manner so flagrant as to demand correction.

Utah Pie has set out some of the more flagrant conflicts between this Court's reading of the record and the Tenth Circuit's subsequent reading of it in the Petition. (Ptn., 7-13, 22, 24.)

Respondents have not even attempted to reconcile the conflicts, and for good reason. They are irreconcilable.

QUESTION 2:

The ostensible ground for the Tenth Circuit's decision is error in the admission of evidence. But, as all respondents agree, the "error" was in admitting an exhibit for

which the Court of Appeals found inadequate foundation. In other words, the Court of Appeals decided facts:

> "The Court of Appeals *analyzed various kinds of evidence* with respect to Utah Pie's sales to determine whether or not the presentation in Pl. Ex. 95 was consistent with this evidence." (Pet. Br. 15-16; emphasis added.)
>
> • • •
>
> "The Court also held that opinion testimony of Utah Pie's salesman that the decline in sales of its Utah brand pies was attributable to the appellants' price discrimination *was not credible,* in view of Utah Pie's greatly increased sales of Frost 'N' Flame brand. . . ." (Pet. Br. 6; emphasis added.)
>
> • • •
>
> "Actually there is only one narrow, factual question to be drawn from the Court of Appeals' decision." (Pet. Br. 9.)
>
> • • •
>
> "The Court of Appeals analyzed the record at length . . . to demonstrate clearly why Exhibit 95 and the exhibits upon which it was based so distorted the undisputed facts of record as to Carnation as to mislead the jury and to require a new trial." (Carn. Br. 7.)
>
> • • •
>
> "The Court of Appeals found, simply, *that in the light of the facts of this record,* plaintiff's principal damage exhibit lacked adequate foundation. . . ." (Cont. Br. 7; emphasis added.)

The Tenth Circuit concluded that Utah Pie's damage charts were without foundation because they did not comport with the facts as it saw them. But the Tenth Circuit

did not view the facts with a mind to affirm the judgments if possible. It analyzed them to support reversal.

Since the Tenth Circuit's analysis of the amounts of the jury's verdicts convinced it that the jury had ignored most of Utah Pie's damage exhibits, it concentrated its fire on the portions of the exhibits in which Utah Pie claimed damage based upon loss of market share *vis a vis* respondents *in proprietary or "name" brand sales.* (Pl. Ex. 95, Line A.)

The Tenth Circuit concluded that there was no foundation for the assumption that Utah Pie would have maintained its market share *vis a vis* respondents in terms of sales under its proprietary "Utah Pie" brand as against respondents' sales under their proprietary brands. (Ptn. App. A, 27-32, 38, 64, 73-74.)

The Tenth Circuit reasoned that in its damage exhibits computing the changes in market share as between the proprietary brands of Utah Pie and the three petitioners, Utah Pie's accounting witness had improperly disregarded the fact that Utah Pie (and Pet) were selling private label pies as well as proprietary label pies, and that there were also "others" in the market besides Utah Pie and the three respondents. (Ibid.)

It conceded that there was direct opinion testimony of Gaylen Rigby, Utah Pie's sales manager, that Utah Pie would nonetheless have maintained its market share in proprietary brands *vis a vis* respondents. (Ptn. App. A, 27-30.) As Pet correctly observes, the Tenth Circuit found this testimony "not credible." (Pet. Br. 6.)

But was it incredible? To be sure, the private brands and the "others" did compete with Utah Pie's "Utah Pie"

brand. But the "others" and the private labels competed with Pet's "Pet-Ritz" and "Swiss Miss", Carnation's "Simple Simon" and Continental's "Morton" as well. It is not unreasonable to believe that although sales of "Frost 'N' Flame" may have cut down on the sales of "Utah Pie" brand pies, they would have also cut into sales of respondents' proprietary brands, and that the proportions of sales *of proprietary brands as between respondents and Utah Pie* would have remained about the same in the absence of respondents' unlawful discriminations.

As for private labels, they are sold almost exclusively on the basis of price; the manufacturer undertakes no advertising of those brands, and in turn, cannot capitalize upon any goodwill which the brand may acquire because he may not sell it to anyone except the particular retailer who controls the brand name.

The manufacturer with the lowest cost may be expected to achieve the greatest success (absent any illegal discriminations) in selling private label pies, because the competition in the sale of private label pies is basic price competition.

The record is clear that Utah Pie Company was the lowest cost producer in Utah. The assumption in Utah Pie's damage exhibit that Utah Pie would have had even more of the private label business in the absence of respondent's violations is fair and realistic. The Tenth Circuit decided that the assumption was not only unlikely, but so completely incorrect as to make the admission of Utah Pie's damage exhibit prejudicially erroneous.

It is the Tenth Circuit which errs. Credibility on these issues was for the jury. While ostensibly deciding an evidence point, the Tenth Circuit was in fact usurping the jury's function.

None of the respondents has so much as mentioned *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962), which clearly holds that a Court of Appeals may not do what the Tenth Circuit has done here.

While it does not address itself to the very serious errors committed by the Tenth Circuit, Continental does make a spirited argument to the effect that its dramatic 1961 price cuts didn't hurt Utah Pie, and may even have helped it.

Continental suggests that Utah Pie's sales surged when it was forced to meet Continental's $2.55-$2.85 price with a price-cut of its own. (Cont. Br. 11, 16.) Utah Pie's price reduction ranged between 35 and 85 cents per dozen, depending on the label. (Pl. Exs. 4, 91.) While there may have been some small increase in volume, Continental ignores facts that the impact of its price cut affected Utah Pie across the board—forcing reductions in price on *all* of Utah Pie's sales to all customers, and greatly reducing the profits which Utah Pie would otherwise have obtained.

In calendar 1960, Utah Pie sold 83,894 dozen frozen pies and showed net profit of $7,636 for fiscal 1960. (D. Ex. PA-35; 386 U.S. at 689.) That works out to slightly more than 9 cents per dozen profit. In calendar 1961, Utah Pie sold 102,690 dozen frozen pies and for fiscal 1961 showed a net profit of $9,216. (Ibid.) Again, its profit was between 9 and 10 cents per dozen. Obviously, across-the-board price cuts of 35 to 85 cents per dozen, necessitated by Continental's

slashing price reductions, could hardly have benefitted Utah Pie. The relatively modest growth in Utah Pie's sales between 1960 and 1961 closely approximates the overall growth of the entire market. (See D. Ex. PA-35.) Continental's argument that its price cuts benefitted Utah Pie won't wash.

Moreover, the injury to Utah Pie's "goodwill" as a result of Continental's price-slash can hardly be doubted. Utah Pie was forced to reduce the prices of its quality brands to the levels previously associated with the cheap "price" pies. To the date of trial, prices of Utah Pie's brands never recovered. (R. 506.) There was direct testimony that Pet had been so concerned about protecting the "image" of its Pet-Ritz brand that it had introduced an entirely new brand so as to have a "fighting brand" to use in markets where it did not want to tarnish the Pet-Ritz label by cutting prices further. (R. 936, 939.)

There was direct testimony that the overall effect of respondents' price-cutting was to injure Utah Pie's good will. Again, Continental's factual argument is simply contrary to the facts of record.

QUESTIONS 3 AND 4:

Respondents take a highly equivocal position with respect to the Tenth Circuit's "psychoanalysis" of the jury verdicts based upon their amounts. Not one of them so much as mentions the cases, cited by petitioner (Ptn. 26-27) which squarely hold that an appellate court may not do what the Tenth Circuit has done. None even argues that the Tenth Circuit was correct in concluding (on the basis

of the dollar amounts of the verdicts) that the jury rejected the bulk of Utah Pie's damage chart entirely and awarded damages for only 2 of the 7 categories listed there.

Instead, they argue that the amount of the verdicts "suggests" prejudicial error (Pet Br. 13) or ". . . reflects the fact that the correct market shares . . . were gerrymandered. . . ." (Carn. Br. 9) or that ". . . a reviewing court must be free to consider all of the facts of record including the amount of the verdict, in order to determine whether trial court error appears to have been prejudicial." (Cont. Br. 9.)

In this case, the evidence (had the Tenth Circuit given Utah Pie the full benefit of it) would have supported jury verdicts greatly in excess of the verdicts rendered. Plaintiff's damage chart asked for much more than the amount which the jury awarded. The jury apparently employed a substantial discount for partisanship and awarded verdicts which were modest in the light of the evidence.

In finding prejudicial error, the Tenth Circuit cut down Utah Pie's case in every way it could. Its analysis of the verdicts excluded the largest part of Utah Pie's damage claims from consideration. It then proceeded to analyze the evidence to show that, in its view, the evidence did not support the amounts claimed in Lines "A" and "G" of the damage chart (the only parts which survived its surgery).

The Tenth Circuit could not have reasonably concluded that the verdicts were excessive in the light of *all* of the evidence of impact and damages in the record. Instead, it concluded that the jury had not even considered most of Utah Pie's damage claim and that the evidence supporting

the small portion of Utah Pie's claim which the jury *did* consider was not adequate. In other words, the Tenth Circuit's deductions about the *manner* in which the jury arrived at its verdicts, based upon the amount of those verdicts, was essential to its decision reversing these judgments.

This mischievous result illustrates the importance of resolving the clear conflict between the Tenth Circuit's approach in this case and the direct holdings in other circuits that no conclusions about the jury's mental process may be derived from the dollar amount of a jury's verdict. (Cases cited in Petition, pp. 26-27.)

Schaffer v. Universal Rundle Corp., ___ F.2d ___ (5th Cir. 1968), 1968 Trade Cases para. 72,505 cited by Continental (Cont. Br. 9) is readily distinguishable. There, the verdict was for $70,000. The plaintiff had complained of defendant's refusal to guarantee a purchase order covering about $38,000 worth of merchandise, and consequent loss of the sale. Since it was mathematically impossible for the verdict for $70,000 to represent damages for loss of profits on the sale of $38,000 worth of merchandise, the Court of Appeals not unreasonably concluded that the verdict encompassed other damages.

Here, by contrast, the verdicts are far less than verdicts which might have been rendered on the evidence. The Tenth Circuit concluded that the jury awarded nothing for the price-depressing effects of respondents' discriminations only because it concluded (on the basis of the dollar amounts of the verdicts) that those verdicts were based entirely upon other elements of damage claimed in Utah Pie's damage exhibits.

A case, such as *Schaffer*, holding that a verdict *must have* included certain kinds of recovery because it is mathematically impossible for that verdict to have been based solely upon more limited claims is in fact the opposite of this case. A verdict may sometimes permit an inference as to why elements of damage have necessarily been *included* in a verdict. But the reverse is not true. Here, the Tenth Circuit decided that the jury had *excluded* important elements of damage from its computations, not because it must logically have excluded them (indeed, it would have been *illogical* to exclude them), but because of surmise about the jury's mental processes based upon the numbers in which the verdicts were expressed.

Respondents cite *no* case fairly supporting this element of the Tenth Circuit's decision.

In its original decision, the Tenth Circuit concluded that the instructions to, and form of verdict returned by, the jury excluded any damages for discriminations outside Salt Lake City. (See 349 F.2d at 153.) Accepting that holding, at least as regards present judgment (if the case must be tried again, Utah Pie will propose instructions and a form of verdict without such limiting results), the jury's verdict must have excluded claims in Lines B, C, and part of Line D. The jury's verdicts against all respondents are still amply supported by Utah Pie's claims for injuries inflicted in the immediate Salt Lake City area as shown in Lines A, E, F, G, and part of Line D. So the Tenth Circuit had to resort to an analysis of the *amounts* of the verdicts to eliminate claims in Lines E, F, and part of Line D. The Tenth Circuit's erroneous procedure is thus central to its decision.

QUESTION 5:

Given the violation found in this Court's prior opinion, there was "impact" upon Utah Pie. The Tenth Circuit has grudgingly conceded that there was some impact.

But the Tenth Circuit has refused to follow the well-established rule that once the violation and the *fact* of impact have been found, an antitrust plaintiff must be allowed considerable latitude in the manner in which it proves the monetary amount of damages. (See Ptn. 30-32.)

That rule must be especially applicable where, as here, the combined and overlapping efforts of three antitrust violators have combined in injuring Utah Pie in such a way as to make the allocation of damages a difficult if not impossible task.

Respondents' arguments that the Tenth Circuit has correctly analyzed the damage evidence only underscore the fact that weight, not admissibility, is the real basis for the Tenth Circuit's result in these cases.

But weight is for the jury.

The Tenth Circuit's decision in these cases cannot be reconciled with the numerous decisions of this Court and of other circuits on the matter of acceptable damage proof in private antitrust cases. None of the three respondents has so much as mentioned any of the following cases which conflict with the Tenth Circuit's decision on this point:

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931);

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927);

Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966);

Rangen, Inc. v. Sterling H. Nelson & Sons, 351 F.2d 851 (9th Cir. 1965);

A. C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959);

Richfield Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959);

William H. Rankin Co. v. Associated Bill Posters, 42 F.2d 152 (2d Cir. 1930).

Pet and Continental urge that *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2nd Cir. 1962), cited by petitioner, demonstrates the correctness of the Tenth Circuit's decision. (Pet. Br. 20; Cont. Br. 12-13.) They seem to recognize that *Herman Schwabe* is a very border-line case—an agonizing decision of the Second Circuit which finally affirms the trial court. The correctness of that decision, even on the facts there presented, in the posture in which they were presented, may well be wrong. As Utah Pie urged in its petition, even the most generous reading of the *Schwabe* decision does not justify the result reached here. For the purpose of this petition, however, it is sufficient to note that the question is a serious and important question relating to the administration of the antitrust laws, and that, accordingly, the writ should be granted.

QUESTION 6:

Needless to say, the defendant in a private antitrust case is never satisfied with the plaintiff's damage exhibits. If that defendant wishes to preserve an objection to those exhibits, it should state the objection and the grounds of the objection in such a way as to give fair notice to the

trial court and to plaintiff. If the damage exhibits are admitted over objection, only such grounds of objection as were urged at trial may be urged on appeal. So much is elementary.

And yet, the Tenth Circuit has here based reversal upon two aspects of Utah Pie's damage exhibits which were never challenged in the trial court by any party:

1. The inclusion of damage calculations for the years 1959, 1960 and 1961 against all respondents, although they now contend that their violations did not occur in all of those years.*

2. The allocation of damages for injury to goodwill between all three respondents equally.

None of the respondents has candidly responded to this issue raised by Utah Pie's Petition. Pet suggests that this Court circumvent the established law on sufficiency of objections by reference to the doctrine of "plain error." (Pet Br. 13.) Carnation urges these two supposed errors, but makes no mention of any objection raised in the trial court on those grounds (there was none). (Carn. Br. 8.) Continental disingenuously cites numerous pages of the record on which objections appear. (Cont. Br. 8.) It neglects to

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*Pet falsely states that "Not until December 1959 did Pet sell frozen fruit pies in a Salt Lake market at a price lower than the price elsewhere", citing "349 *U.S.* at 152." (Pet Br. 12.) Apparently, the reference should be to the Tenth Circuit's opinion in 349 *F.2d*, which was *reversed by this Court*. Although Pet's formal contract with Safeway was effective January 1, 1960, Pet's Safeway business in 1959, without a contract, amounted to 22.8% of the entire Salt Lake City market for that year! (386 U.S. at 693.) Pet's sales of Bel-Air to Safeway were discriminatory throughout. (See Pl. Exs. 116, 118, 119, 122; D. Ex. PA-35.)

Carnation also misstates the fact. Carnation's discriminations also began in 1959. (See Pl. Exs. 64, 65; D. Exs. C-E, C-F.)

mention that none of that lengthy and argumentative exposition by its counsel or by counsel for Pet and Carnation, contains any reference to either point now raised.

In fact, neither aspect of Utah Pie's exhibit provides a predicate for a finding of error in admission of evidence, let alone "plain" error:

1. As for the years included in the damage exhibits, Pl. Exs. 94, 96, 97, 98, 99 and 100 clearly showed the amounts of damage allocated to the defendants *by years*. If the jury found no violation as to a particular respondent in a particular year, the means with which to exclude Utah Pie's claims against that respondent for that year was before it. Respondents doubtless recognized this at trial when they withheld their objections.

2. As for the allocation of goodwill damages equally among respondents—$25,000 apiece—the principle is clearly reasonable, and at the time of trial, respondents apparently agreed by making no objection. The case was tried both as a conspiracy case and with separate Robinson-Patman counts against respondents individually. The testimony showed overall injury to Utah Pie's good will, based upon the combined effect of all respondents' acts. Had respondents urged the Restatement Rule, they would have been entitled to be held liable for an unapportioned $75,000 jointly and severally. Had they felt that there was some more reasonable basis of apportionment, they might have urged it. They did neither; indeed they did not even object to (let alone suggest an alternative method of allocation). Moreover, the $75,000 good will damage figure originally came into evidence as opinion testimony without objection from any respondent. (R. 522.)

QUESTION 7:

The Tenth Circuit feels that Utah Pie should be required to "trace" its injuries to particular violations by respondents. (Ptn. App. "A", 49.) It analyzes the evidence as if effects of particular pricing practices of particular respondents could be isolated and precisely defined in terms of diversion of business and impact upon Utah Pie's prices. It does not suggest how this should be done better than Utah Pie has already done it. Nor have respondents offered any suggestions. It is, in fact, difficult to do.

Utah Pie did its best to allocate its injury resulting from the complex of overlapping violations committed by respondents. There can be no doubt that respondents' violations all contributed materially to Utah Pie's injury.

The purpose of the rule allowing recovery where the wrongdoer's acts "materially contribute" to damages to prevent wrongdoers from escaping liability where several causes interact. It is an aspect of the rule that, where impact is shown, difficulty in precise computation of damages should not preclude recovery.

Pet recognizes that ". . . each defendant violated Section 2(a) at varying times and in varying degrees." (Pet Br. 22.) It does not, however, seem willing to recognize that these violations were in large measure simultaneous. The rule of Section 433A of Restatement of Torts, 2d, recognizes that harm may be apportionable, as suggested by Pet. (Pet Br. 23.) But it goes on to provide that once plaintiff has shown causation in fact linking a defendant to its injury, the burden of allocation is *upon the defendant.* (See § 433B, Restatement of Torts, 2d.) If Pet did not like Utah

Pie's allocation of damages as between respondents it could have and should have made its own.

Carnation does not mention the point at all.

Continental simply says "there is simply no room for petitioner to claim any difficulty in attributing losses, if any, suffered by reason of Continental's price reduction to one or the other of the defendants." (Cont. Br. 16.) This neatly begs the question, in two ways. First of all, it presumes that there is real doubt about the adverse effects of its discriminations upon Utah Pie. But in the same breath it says that there is no reason for attributing losses attributable to its conduct to the other defendants. However generous this may appear, the fact remains that Continental's discriminations were going on at the same time as substantial discriminations by both Pet and Carnation.

Utah Pie attempted an allocation of damages between defendants. Utah Pie believes that that allocation was appropriate; whatever weight the jury may have given it, it was certainly not prejudicially erroneous to admit it in evidence. If respondents were unsatisfied, they should have made their own proposed allocation, or at least made objections to the allocation used by Utah Pie. Having conceded the difficulties in allocation, they may not now be heard to complain of the methods used by Utah Pie.

QUESTION 8:

Question 8 reads: "Did the admission in evidence of Utah Pie's damage exhibits constitute prejudicial error as to any or all of the respondents?" (Ptn. 4.)

This overall question encompasses the merits of the Court of Appeal's decision and all of the component decisions upon which the overall decision is based.

As Utah Pie has demonstrated, the Tenth Circuit's overall decision is based upon a whole series of errors, all of which are inextricably woven into the fabric of the Tenth Circuit's opinion.

Should this Court grant certiorari, Utah Pie will demonstrate that the admission of Utah Pie's damage exhibits was not error, let alone prejudicial error, and that the judgment of the Tenth Circuit must be reversed and the judgment of the trial court affirmed.

The present question is whether the Writ should be granted, and not its disposition. QUESTION 8 presents the general, overall question here at issue. Its resolution in the Tenth Circuit was based upon the resolution of all of the other important questions here presented. In order to dispose of the whole case, the Writ should be granted as to QUESTION 8 as well as all the other questions.

CONCLUSION

Respondents have attempted to answer the petition in this case by arguing that the overall result is correct on the merits. It is not. But in any event, the Tenth Circuit's decision rests upon a whole series of errors—errors which put it in conflict with this Court's decision on the facts of this case, and errors which repeatedly put it in conflict with other decisions of this Court, of other Courts of

Appeal, and with well-established principles of tort law generally.

For the reasons stated in the Petition and herein, Utah Pie's Petition for a Writ of Certiorari should be granted and the decision of the Tenth Circuit reversed.

Dated, San Francisco, California,
September 23, 1968.

Respectfully submitted,
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